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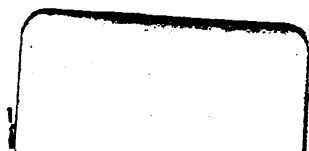
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JOHNSON'S
CHANCERY REPORTS.
VOL. IV.

July 30 41

REPORTS
OF
CASES
ADJUDGED IN THE
COURT OF CHANCERY
OF
NEW-YORK.

BY WILLIAM JOHNSON,

Counselor at Law.

VOL. IV.

CONTAINING THE CASES FROM JANUARY, 1819,
TO DECEMBER, 1820, INCLUSIVE.

ALBANY:

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1821.

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BE IT REMEMBERED, that on the first day of June, in the forty-fifth year of the Independence of the United States of America, WILLIAM JOHNSON, of the said district, hath deposited in this office the title of a book, the right whereof he claims as author, in the words and figures following, to wit:

"Reports of Cases adjudged in the Court of Chancery of New-York." By William Johnson, Counsellor at Law. Vol. IV. containing the Cases from January, 1819, to December, 1820, inclusive."

In conformity to the act of the Congress of the United States, entitled, "An act for the encouragement of learning, by securing the copies of maps, charts, and books, to the authors and proprietors of such copies, during the times therein mentioned;" and also to an act, entitled, "An act supplementary to an act, entitled, 'An act for the encouragement of learning, by securing the copies of maps, charts, and books, to the authors and proprietors of such copies, during the time therein mentioned, and extending the benefits thereof to the arts of designing, engraving, and etching historical and other prints.'"

G. M. THOMPSON,
Clerk of the Southern District of New-York.

Recd June 30, 1912.

REPORTED IN THE FOURTH VOLUME.

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CASES

ADJUDGED IN

THE COURT OF CHANCERY

OF

NEW-YORK.

JAMES KENT, Esq. CHANCELLOR.

P. & H. HAM *against* SCHUYLER and others.

1819.

HAM
v.
SCHUYLER.

Nov. 13, 1818,
and Jan. 8,
1819.

Where a farm had been occupied and cultivated for above eighty years, during which time the original tenant and his descendants uniformly paid rent to the landlord, built houses, and made valuable and permanent improvements on the premises; *Held*, that a lease in fee, at the acknowledged rent, was to be presumed to have been originally given, or, at least, that there was an *agreement* for such a lease, under which the tenant took possession, and upon the faith of, and in execution of which, he made his improvements. Equity, as well as a court of law, or a jury, may make such presumption: Decreed, accordingly, that the devisees, or those claiming under the original landlord, execute such a lease, with the usual covenants contained in ancient leases in fee of lands in the same tract or manor of the lessor.

THE bill of the plaintiffs stated, that in 1730, *Casper Ham*, the grandfather of the plaintiffs, with the consent of the proprietor of the manor of *Rensselaer*, entered into possession on the east side of the *Hudson* river, of a part of the manor then being a wilderness, except a few settlements near the river. That *Casper Ham* had the promise of a lease

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from the proprietor, and paid an annual rent. That some time previous to the year 1760, the land was transferred to *Elizabeth Ten Broeck*; and between 1760 and 1780, *Abraham Ten Broeck*, her husband, became solely seised of the tract. That after the transfer, the proprietor of the manor assured *Casper Ham* that he should still hold the land, as his other tenants, paying to *Abraham Ten Broeck* the rent. *Casper Ham* continued in possession, and paid rent until his death, about fifty years ago. He left *P. Ham*, father of the plaintiffs, his only son and heir at law, who continued in possession, made valuable and permanent improvements on the premises, and paid rent to *Abraham Ten Broeck*, at the rate of twenty-five skipples of wheat, or five pounds in money, until 1786 or 1787, when a general survey of the manor was made. From that time, until his death, in 1806, *P. Ham* paid rent, at the rate of one shilling per acre, two loads of wood, and four fowls, annually. A survey of the farm, which included the premises in question, was made between 1760 and 1770, by order of *Abraham Ten Broeck*, and the survey contained 260 acres. *P. Ham*, about forty years since, built a large house on the premises, and made valuable improvements thereon. *Casper Ham* planted an orchard, more than sixty years ago, and cleared and inclosed more than fifty acres. In 1798 or 1799, *Ten Broeck* directed *P. Ham* to pay some arrearages of rent, and to sell his improvements on fifty acres to one *Filkin*; and he accordingly sold them to *Filkin*, for 250 dollars, and *Ten Broeck* executed a lease for three lives to *Filkin*. At various times, afterwards, *Ten Broeck* promised to give *P. Ham* a lease for lives of the farm, at the usual rent, before paid by the father of the plaintiffs. The bill further stated, that *Ten Broeck* afterwards refused to execute a lease; that *P. Ham* continued to work and improve the land, believing that he had a permanent interest in it, and that *Ten Broeck* or his heirs were bound to give him a lease for lives, if not a greater estate. That *P. Ham* made his will, devising seventy acres to his son, *Casper Ham*,

and the residue to his other sons, *Andrew* and *John*, and the plaintiffs, equally, who divided the same between them, and have continued to make valuable and permanent improvements on the lots, believing that they had a valuable interest in the land, which would be protected in law or equity.

That *Ten Broeck* died in 1810, and by his will, dated *March 27*, 1809, devised the premises to his daughter *Margaret*, who devised all her real estate in the county of *Rensselaer*, *June 9*, 1812, to her sister *Elizabeth*, wife of *Rensselaer Schuyler*, during life, and after her death, to her children, living at the time of her death, in fee; and if she died without leaving lawful issue, at the time of her death, then to the children of her brother *Dirck*, equally, in fee. *Rensselaer Schuyler*, and *Elizabeth* his wife, on the 6th of *January*, 1813, sold to *James Kane*, 645 acres, including the premises in possession of the plaintiffs, during the life of *Elizabeth*. The bill was filed against *Rensselaer* and *Elizabeth Schuyler*, *James Kane*, and the children of *Dirck Ten Broeck*, having an interest by way of contingent remainder. The devisees refused to execute the agreement for a lease, so stated to have been made by *Abraham Ten Broeck*, gave notice to quit, and brought an action of ejectment against the plaintiffs, to recover the lots in their possession. The bill prayed that a lease for three lives might be decreed to be executed by the devisees, according to the agreement made with *Abraham Ten Broeck*, and for an injunction, &c.

The defendants, in their answers, denied their knowledge or belief of the material allegations in the bill.

The material parts of the evidence are sufficiently stated in the opinion delivered by the Chancellor.

The cause was argued by *Woodworth* and *Van Buren* Nov. 13, 1818. (Attorney-General) for the plaintiffs, and by *Henry* and *Van Vechten* for the defendants.

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least

For the plaintiffs, it was contended, 1. That the facts proved were sufficient to afford the presumption of an agreement, in 1730, between the proprietor of the manor of *Rensselaer* and *Casper Ham*, for a perpetual lease, at a rent of one tenth, which was, afterwards, by agreement of the parties in interest, modified as to the rent, and converted, at ~~most~~, into an agreement for three lives. (12 *Vesey*, 239. 2 *Vernon*, 516. *Roberts on Frauds*, 135.) 2. That the proof of acts of part performance were sufficient to take the case out of the statute of frauds; and that the improvements made at the instance of the respective proprietors, with a promise of security, entitle the plaintiffs to a lease for three lives, at least. (*Roberts on Frauds*, 141. *note*. *Powell on Contracts*, 296. *Newland on Contracts*, 183.) 3. That the plaintiffs, at all events, were entitled to be paid for their improvements before the injunction was dissolved.

For the defendants, it was contended, That antiquity of possession was no ground for this Court to presume an agreement for a lease, or to direct one to be given. There was no satisfactory evidence of any communication from the proprietor of the manor, as to the particular estate to be given *Casper Ham*. The plaintiffs are compelled to resort to the promise of *Ten Broeck*. Then the statute of frauds is a defence which can only be avoided by showing *fraud*, or acts of *part performance*, neither of which is alleged in the bill. Improvements made on the premises cannot be considered as acts of part performance. Besides, the permanent improvements were all made before the promise of *Ten Broeck*, in 1803. The rent was merely nominal. There can be no equitable claim for improvements.

Jan. 8, 1819. The cause having stood over for consideration, the following opinion was now delivered by the Court.

THE CHANCELLOR. This case affords a necessary presumption, either of a lease in fee to *Casper Ham*, the ancestor of the plaintiffs, from *Van Rensselaer*, the proprietor of the manor, or of an agreement for such a lease.

The premises are included in the manor of *Rensselaer*; and *Casper Ham* took possession, some time in the former part of the last century, of about 300 acres of land, of which the premises are a part. The precise time cannot be ascertained, though the family tradition is, that he entered in or about the year 1730. His daughter *Marije*, who was eighty-five years of age at the time of her examination, fixes upon that period, and speaks from information and belief derived from her early life. There is no doubt, that *Casper Ham* took possession under the proprietor of the manor, at some distant period of time beyond the memory of man, and that he continued in possession, making valuable improvements, and exercising various acts of ownership, down to his death, in the year 1777. The rent that *Casper Ham* paid is ascertained, not merely by the faint recollections or traditional information of his family, but by authentic written testimony. In the books of *Abraham Ten Broeck*, there is a charge, in 1766, against *Casper Ham*, for three years rent, at twenty-five skipples of wheat, four fowls, and two loads of wood a year; and there are several other entries to the same effect. As to the length of time in which *Casper Ham* occupied the land, we find in the same books, of the date of *January*, 1799, a charge of thirty years rent due from *Casper Ham*, and this carries his occupation back thirty years from 1777. These charges, also, show the nature and amount of the rent paid, or due, to the proprietor of the manor, before the sale by the proprietor to *Ten Broeck* and his wife, in 1764.

It is in proof, that the adjoining manor lands are generally held under leases in fee, subject to an annual rent.

When *Casper Ham* died, in 1777, his son *Peter* was his

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SCHUYLER.

heir at law, and he continued in possession of the inheritance derived from his father. We find him

Gaudentem patrios findere sarculo

Agros.——

He made valuable improvements, and exercised various acts of ownership down to his death in 1807. He paid the same rent that his father had paid to *Ten Broeck*, viz. twenty-five skipples of wheat, two loads of wood, and four fowls, until, by agreement, the payment in wheat was commuted for a payment in money, at the rate of one shilling per acre. Of the payment of the rent by *Peter Ham* there is abundant proof. He sold, in his life-time, fifty of the 300 acres, descended to him from his father, to one *Filkin*, with the assent and approbation of *Ten Broeck*, for 100 pounds; and *Ten Broeck* gave credit to *Peter Ham* for that sum, in *October*, 1799, as so much money received from *Filkin*, to whom *Peter Ham*, “with his consent,” had given up fifty acres “of what he had under improvement.” *Ten Broeck* afterwards gave *Filkin* a lease for three lives of those fifty acres, at the rate of one shilling an acre.

Peter Ham, by will, devised his farm of 250 acres (deducting the fifty acres sold to *Filkin*) to his five sons, in different proportions; and it is in proof that those devisees continued, after the death of their father, to pay, and *Ten Broeck*, and after his death, his representatives, to receive, the same rent of one shilling per acre, and two loads of wood, and four fowls a year, down to a period as late as 1813.

Here, then, we have the striking fact of a farm occupied and cultivated, under a steady and uniform rent, for three generations, and including a period of upwards of eighty years; and yet, according to the allegation on the part of the defendants, the plaintiffs, and their ancestors, were nothing, during all this time, but mere tenants at will. The fact is utterly incredible. The ancestors of the plaintiffs claimed a permanent interest in the soil, and their va-

rious, constant, and expensive improvements corresponded with such a claim. There is one fact which shows an unequivocal recognition of the claim by *Ten Broeck*, the owner of the rent. He consented that *Peter Ham* should sell fifty acres to *Filkin*, and he received from *Filkin* 100 pounds, being the consideration of such sale, and gave *Peter Ham* credit for that sum, on his arrearages of rent. Can we reasonably suppose, that *Ten Broeck* considered *Peter Ham* as a mere tenant at will, when he allowed him to demand, and *Filkin* to give, 100 pounds for only fifty acres of the farm, and to receive himself from *Filkin* the fruits of the purchase? If *Filkin* bought only a possession held at will, such a price, given twenty years ago, was the grossest imposition and extortion, under the sanction of the landlord. I have too much respect for the memory of General *Ten Broeck* to believe that he then viewed the interest of *Peter Ham* in so trivial a light.

We must presume, that a lease in fee, under the acknowledged rent, was originally given to *Casper Ham*, and equity may make such presumption, as well as a Court of law and a jury. (*Steward v. Bridger*, 2 *Vern.* 516. *Hilary v. Waller*, 12 *Ves.* 252. 269.) But if that presumption cannot be indulged, because the witnesses seem to have understood that neither of the *Hams* ever pretended that such a lease was actually executed, we must then conclude, that there was an original agreement for such a lease, and that the elder *Ham* took possession under that agreement, and made his improvements, from time to time, upon the faith of it, and in execution of it. The agreement was not a lease for lives. The facts afford no foundation for that inference. The land was occupied, and the rent paid, through successive generations; and if those facts are evidence of any original agreement, they must be of an agreement for a perpetual lease, according to the custom of the manor, upon the reservation of the rent afterwards, and constantly, paid. The delivery of possession may amount to part

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performance; and the fraud consists in permitting this possession to take place, and in leading on *Casper Ham* and his son, through a period of fifty years, to expend money and labour in the melioration of the estate, and then to withdraw from the performance of the agreement. "Possession is so strong a title," said Lord *Northington*, "that a judge may have emphatically said, he would presume an act of Parliament to support and confirm it." (1 *Eden's Rep.* 286.)

It is proved that *Ten Broeck* and *Peter Ham* did agree to a lease for lives; but that agreement, which was a substitute for the original one which I have presumed, was by parol, and never carried into effect, and cannot be enforced. The lives are not ascertained, and we are obliged to recur back, and to exact a performance of the original agreement for a lease in fee, subject to the variation in the rent of the one shilling an acre, for the skipples of wheat, and which was for many years executed and acted upon by both parties.

I shall accordingly decree, that the defendants execute to the plaintiffs a lease in fee, for the two pieces of land described by metes and bounds, in the depositions of the witnesses, the one containing eighty-two, and the other ten and a half acres; that the annual rent to be reserved thereon be eleven dollars and fifty-six cents, together with two loads of wood, and four fat fowls; and that the lease contain the usual stipulations and covenants in the ancient leases in fee of lands in that part of the manor of *Rensselaer*, lying east of *Hudson's* river; and that it be referred to a Master to ascertain and settle the form of such lease, and report the same; and that the question of costs, and all other questions, be, in the mean time, reserved.

Decree accordingly.

1819.

SMITH
v.
KNISKERN.

SMITH and another *against* KNISKERN and others.

A testator possessed of a large real and personal estate, bequeathed to his wife, his household furniture, &c. and "*her comfortable support and maintenance out of his estate, to be, from time to time, rendered and paid to her by his executors*, and the use of one room in his dwelling-house, during all such time as she should continue to be his widow, and no longer:" And after a legacy to a granddaughter, he devised the rest of his estate equally between his two daughters: *Held*, that though the charge of a "comfortable support and maintenance," might fall upon the real as well as the personal estate, it did not affect the widow's right of dower; there being no express declaration on the subject by the testator, nor any thing inconsistent in the two claims, and that, therefore, the widow was not to be put to her election. January 8th.

BILL for a partition. *Jacob Kniskern* died possessed of a large real and personal estate in *Schoharie*, and by his last will, dated the 23d of *February*, 1818, he gave to his wife, "all his beds and bedding, together with all his household furniture, his negro wench *S.* and negro boy *J.*, and her comfortable support and maintenance out of his estate, to be, from time to time, rendered and paid to her by his executors, and the privilege and use of one room in his dwelling-house during all such time as she should continue to be his widow, and no longer." He next directed his executors to sell so much of his personal estate as to raise 330 dollars, including his outstanding debts, and to pay 300 dollars of the sum to his granddaughter *C.*, and the 30 dollars to be laid out in furniture for her, &c. The testator then gave a moiety of all the residue of his estate, real and personal, to his daughter *Eve*, and the other moiety to his daughter *Elizabeth*. The bill prayed for a partition, and that the widow might be decreed to elect whether to take the provision under the will, or to claim her dower.

1819.

SMITH
v.
KNISKERN.

The widow, in her answer, insisted, that she was not bound to make an election, but if she was bound, she elected to take the provision under the will.

B. Chamberlain, for the plaintiffs. 1 *Term Rep.* 411. 2 *Term Rep.* 656. 3 *Term Rep.* 359. 4 *Term Rep.* 93. *Co. Litt.* 36. b. , *Cruise's Dig.* tit. *Dower*, c. 5. s. 33. 35.

I. Hamilton, contra. He cited *Cruise*, tit. *Dower*, c. 5. s. 22. 29. *Adsit v. Adsit*, 2 *Johns. Ch. Rep.* 448.

THE CHANCELLOR. The charge of a "comfortable support and maintenance," falls, probably, upon the real estate as well as the personal. But the latter ought to be first applied; and as the executors were directed to render the maintenance from time to time, and as no authority is given to them over the real estate, it would seem that the testator had a particular reference to the personal estate, in making that provision for his wife. I do not perceive, however, that the provision destroys the right to dower. There is no inconsistency between the two claims, even supposing the charge for maintenance to rest upon the real estate. From the large and valuable real estate set forth in the pleadings, and admitted, it is quite apparent that the real estate is much more than adequate to furnish the support and the dower. There is nothing repugnant in the operation of the two claims; and the assertion of the right of dower, will not disturb or defeat any provision in the will. A comfortable maintenance is a provision of a very modest pretension, and it can easily be supposed to have been intended to aid the right of dower, and to secure, in every event, comfort and competence to the wife. But whether the testator had any thought, at the time, of the claim of dower, cannot be certainly known. It is sufficient that he has not made any declaration of his will on the subject, and, therefore, the doctrine in *Adsit v. Adsit* will

apply, and must govern the case. The rule is, that the widow takes both provisions, unless the estate is insufficient to support both, or such an inconsistency appears between the provisions in the will, and the dower, as to make the intention clear and indubitable, that both provisions were not to be taken.

I shall accordingly declare, that the widow is not to be put to her election.

Decree accordingly.

1819.
DALE
v.
COOKE.

DALE and others, Executors of FULTON, against COOKE.

Joint and separate debts cannot be set off against each other in equity, *January 11th.*
any more than at law.

To authorize a set off, the debts must be mutual, and due to and from the same persons, in the same capacity.

Therefore, a debt arising on a contract made with an executor, cannot be set off against a debt due from the testator.

THE bill stated that *the plaintiffs, together with Robert L. Livingston and Edward P. Livingston*, on the 29th of April, 1817, leased to the defendant, certain lands in the city of Jersey, for one year, paying to the lessors the yearly rent of 100 dollars, in half yearly payments, with liberty to the defendant to extend the term for four years after the expiration of the first year, which he elected to do, subject to the same rent. That the defendant entered, and is now in possession, and hath paid no rent; so that, on the 1st day of November last, there was due 1,500 dollars. That the defendant has sued the plaintiffs, as executors of *Fulton*, and in December last, recovered 1,166 dollars and 66 cents; and the plaintiffs could not, *at law*, set off the rent so due to them, and the said *Robert L. Livingston, and Edward P.*

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Livingston. That the defendant refused to allow the set-off, though the plaintiffs are in possession of the lease, and have authority to give receipts and discharges for the rent. That the defendant is in insolvent circumstances, and unless the set-off be allowed, the rent due will be lost, by reason of the insolvency of the defendant. Prayer for an injunction, &c.

Henry, for the plaintiffs, moved for an injunction, and cited *Montagu on Set-off*, 1. 9. 65.

THE CHANCELLOR. There is no sufficient ground for a set-off stated in this bill. The defendant has recovered a judgment at law against the plaintiffs, as executors of *Robert Fulton*, deceased, and now they ask for the interference of this court to enable them to set off against that judgment, rent due to them and the *Livingstons*, upon a lease of lands made by them and the *Livingstons*, to the defendant, since the death of *Fulton*. It does not appear from the bill, that the lands, so leased, belonged to their testator, or that they executed the lease in their representative character, as executors, or that they had any concern as executors, with the real estate of *Fulton*, or in what proportions the *Livingstons* and they were interested in that rent. There is no mutuality or privity appearing between the two debts, and it would be equally unprecedented and dangerous to interfere in the case. Before I could deal with that rent by way of set-off, the two *Livingstons* ought to be brought into court, and it would be necessary to take an account between them and the plaintiffs, or, in some other way, to ascertain what part of the rent belonged to the present plaintiffs; and I ought equally to know whether this rent was assets in their hands, as executors. I can scarcely conceive of a bill more defective in all the material allegations to support the claim now set up.

In *Duncan v. Lyon*, (3 *Johns. Ch. Rep.* 351.) I took occasion to look into the doctrine of set-off, and though the point there was not precisely upon a joint and separate demand, yet it was assumed as a general rule of law and equity, that a *joint* and a *separate* debt, could not be set off against each other. The debts, or the credits, for they were considered as subject of set-off, must be mutual, and due to and from the same persons in the same capacity. If there be any exception to this general rule, it must arise, as Lord *Eldon* said, (3 *Merivale*, 618.) *under particular circumstances*, as where there is a clear series of transactions in which *joint credit* has been given. In respect to credits, it is well understood, (*James v. Kynnier*, 5 *Ves.* 108.) that to constitute an equitable set-off, there need not be strictly mutual debts; and it is sufficient that there are mutual credits. Such is also the language of our set-off act.

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It is an established rule in the courts of law, that if executors sue for a debt created to them since the testator's death, the defendant cannot set-off a debt due to him from the testator. This would be altering the course of distribution. (*Shipman v. Thompson*, *Willes' Rep.* 103. *Tegetmeyer v. Lumley*, *Willes' Rep.* 264. note.) I see no reason why the same rule should not prevail in equity. The general doctrine on the subject is the same in both courts, as was shown in *Duncan v. Lyon*; and if the defendant could not set off in such a case, neither could the executor, if he was the defendant, for the rule must be mutual. The cases in which there has been more relaxation of the rule of law, which forbids a set-off between joint and separate debts, are ~~supposed~~ cases in bankruptcy; and it is said that the Chancellor's jurisdiction in bankruptcy relative to set-off, is derived from the statutes of 13 *Eliz.* and 5 *Geo. II.* and is wholly unconnected with the general set-off act of *Geo. II.* (2 *Maddock's Treatise on the Principles and Practice of Chancery*, 512—515.) Even in these bankrupt cases, the departure from the general rule seems to be

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questioned, and, at last, prohibited, notwithstanding the statutes of bankrupt embrace mutual credits as well as mutual debts.

In the case, *ex parte Edwards*, (1 *Atk.* 100.) which came before Lord *Hardwicke*, by petition in bankruptcy, a creditor to *A.* and a debtor to *B.* (both of whom were declared bankrupts,) petitioned that the suit by the assignees of *A.* and *B.* might be stayed, and his debt from *A.* be set off. The Chancellor treated it as a doubtful case, and by way of experiment, directed an inquiry to see how much he owed the joint estate, and how much the separate estate owed him. It does not appear what became of the case afterwards, or that any decision was ever made. On the strength of this case, Lord *Rosslyn*, in *ex parte Quintin*, (3 *Ves.* 248.) allowed a party to set-off the share of a bankrupt partner in a joint debt, due from him to the partnership, against the debt due from the bankrupt individually, to him. But in *ex parte Twogood*, (11 *Ves.* 517.) Lord *Eldon* examined and disapproved of this decision. He said, that he did not understand the reason or principle of it, for the partnership debts were all actually paid. If there be debts, he observed, which could not be set off at law, must all the affairs of the bankruptcy be suspended, until all the accounts are cleared, in order to see what rights of set-off there may be in the result? The consequence would be, that where there are joint and separate debts, which cannot be set off at law, in every bankruptcy, the proceedings must be suspended until the accounts are taken, and it is seen what the joint estate, and what the separate estate will pay. The counsel, in that case, declared that there was no instance of a bill to relieve the hardship at law, in not setting off these demands. The Chancellor thought there was a good deal of natural equity in the proposition, upon which the petition stood, yet he denied the relief sought in the nature of a set-off against a separate creditor of the bankrupt, indebted to the partnership to a greater amount.

The case, *ex parte Hanson*, (12 *Ves.* 346.) was before Lord *Erskine*. *H. & W.* were indebted on a joint bond, (*H.* as principal and *W.* as surety,) to *C. & P.*, who were bankrupts, and who owed *H.* The assignees sued *H.* on his bond, and he applied by petition to be allowed to set off. It was admitted upon the argument, that there could be no set-off at law between joint and separate debts, and the petitioner relied on *ex parte Stephens*, (11 *Ves.* 24.) which the other side said was decided upon equitable grounds administered in bankruptcy, viz. the fraud. The Chancellor allowed the set-off on account of the joint bond being that of principal and surety; and he said, that his jurisdiction in bankruptcy was equitable as well as legal. When this case came again before the Court on the Master's Report, (18 *Ves.* 232.) Lord *Eldon* observed, that the joint debt there was nothing more than a *security for a separate debt*.

Here, then, is the result even of these set-off cases in bankruptcy. They leave the general rule very much as it had existed before; and in the recent case of *Addis v. Knight*, (2 *Meriv.* 121.) the Master of the Rolls said, that "It is quite clear, that as at law a joint cannot be set off against a separate debt, the same rule prevails in equity, and must continue to prevail, so long as the present system, in regard to joint and separate estates, subsists. The case, *ex parte Quintin*, may be considered as an exception; but in *ex parte Twogood*, Lord *Eldon* expresses his disapprobation of that decision."

My conclusion is, that joint and separate debts cannot be set off in equity any more than at law; and if the bill was free from the other fatal imperfections which I have mentioned, and the case was reduced to this single point, I should be obliged to deny the motion.

Motion denied.

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February 10.

The motion was renewed upon an amended bill, stating that the plaintiffs, as executors of *Robert Fulton*, deceased, together with *R. L. Livingston* and *Edward P. Livingston*, made the lease to the defendant, and that the two *Livingstons* had, by deed, and for a valuable consideration, assigned to the plaintiffs, as such executors, their right and interest in the rent reserved by the lease.

Henry, for the motion.

THE CHANCELLOR observed, that one objection to the injunction had been removed; for it would seem here was no longer the case of an attempt to set off a joint against a separate debt. But another difficulty still remained. Here was an application to set off a debt arising on a contract with an executor, against a debt arising on a contract with the testator. They are not debts due to and from the same persons, in the same capacity, and there is no mutuality. It would be confounding the contracts of testators with the contracts of executors.

To remove this objection, it ought at least to have appeared, that the lands so leased belonged to the testator, at the time of his death, and that the executors had authority to lease the same, and that the rent was made assets for the payment of debts. The will ought to have been set forth, or so much of it as was requisite to satisfy the Court in those particulars; the ownership of the lands leased ought, also, to have been stated.

Motion denied.

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DORR against SHAW.

If one judgment creditor has a right to go upon two funds, and a second judgment creditor upon one of them, belonging to the same debtor, the former may be compelled to apply first to the fund not reached by the second judgment, so that both judgments may be satisfied.

But if the first creditor has a judgment against *A.* and *B.*, and the second against *B.* only, the latter cannot compel the former to take the land of *A.* only; it not appearing whether *A.* or *B.* ought to pay the debt due the first creditor; nor any equitable right shown in *B.* to have the debt charged on *A.* alone.

THE bill stated, that in *April*, 1813, *David Stafford* was *January 26th.* seized of seventy-two acres of land, and his son *P. S.* of thirty acres of land adjoining. In *April*, 1813, they executed a judgment bond to the defendant, for the payment of 437 dollars, with interest. On this bond, judgment was soon after entered up in the Court of C. P. of *Washington* county. On the 1st of *October*, 1813, *D. S.* executed a judgment bond to *Worthy Waters*, for 1,600 dollars, on which a judgment was on the same day entered up. In *May*, 1817, the seventy-two acres of land of which *D. S.* was seized, were sold under an execution issued on this judgment. Previous to this sale, *W. W.* assigned the judgment to the plaintiff, to whom he was indebted in the sum of 2,000 dollars. The plaintiff purchased the seventy-two acres of land at the sheriff's sale, and took possession thereof, and still remains in possession. The sheriff's deed was dated the 22d of *July*, 1818. The defendant had caused an execution to be issued on the judgment first above mentioned, and the sheriff had advertised for sale the lands of *D. S.* and *P. S.*, in lot 20, of *Cambridge Patent*, except thirty acres sold by *P. S.* to *Reuben Park*. This lot, No. 20, contained

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the seventy-two acres, and the thirty acres, above mentioned. The bill further stated, that the thirty acres were worth more than the judgment debt in favour of the defendant; that the plaintiff was willing, and had offered to pay the judgment to the defendant, if it had not been already paid, on condition that he would assign the judgment to the plaintiff, which he had refused to do. The plaintiff prayed that the defendant might be decreed to cease all proceedings on his judgment and execution, or be compelled to assign the same to the plaintiff, on being paid the debt, interest, and costs.

The *answer* of the defendant admitted the judgments, &c. as stated in the bill; that *D. S.* had made him three several payments, amounting in the whole to 245 dollars, which was all that had been received, and that the residue still remained due on the judgment. That when the judgment was entered up, *D. S.* was seised of seventy-two acres, and *P. S.* of thirty acres adjoining, in lot No. 20. That on the 25th of *October*, 1814, *Reuben Park*, who had purchased the seventy-two acres, and the thirty acres, mortgaged the same to *D. S.* to secure the payment of 1,000 dollars, part of the purchase money; and on the 5th of *June*, 1815, *D. S.* assigned the bond and mortgage of *Park* to the defendant, for 818 dollars. That on the 27th of *January*, 1817, *P. S.*, in consideration of 500 dollars, conveyed the thirty acres to the defendant. That on the 18th of *September*, 1817, the defendant caused an execution to be issued on the judgment first above mentioned, and on which the seventy-two acres were advertised for sale, and the plaintiff became the purchaser, as stated in the bill. That before the bid, the plaintiff "had notice that the judgment in favour of *W. W.* was without consideration, and fraudulent; that the defendant had an older judgment, on which above 500 dollars was due, and that the thirty acres were owned by the defendant." The defendant admitted the other facts

as charged in the bill, but alleged that the assignment of the judgment by *W. W.* was fraudulent.

The cause was submitted to the Court on the bill and answer; and it was agreed that the answer was to be taken as true, except as to the allegations of fraud as to the judgment in favour of *W. W.*, and its assignment.

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Shepherd, for the plaintiff.

Crary, for the defendant.

THE CHANCELLOR. This case presents complicated relations; but it may be illustrated in an easy manner. The defendant holds a judgment against *A.* and *B.* binding upon seventy-two acres of land owned by *A.*, and thirty acres of land owned by *B.* It does not appear whether *A.* and *B.* were both principal debtors. They were father and son, and the pleadings are silent as to the origin of the judgment debt. The plaintiff is assignee of a younger judgment against *A.* only, and binding on the seventy-two acres. It does not appear when the plaintiff became such assignee. The bill only states, that he took an assignment of the judgment before a sale upon execution under it, and which sale is stated to have been in *May*, 1817. The instrument of assignment bears date in *October*, 1816, but the time of execution is not proved. The defendant purchased the thirty acres from a person who had purchased from *B.*, and his purchase is stated to have been in *January*, 1817; and it is further stated, that at the sale, the plaintiff was informed of that purchase by the defendant, and that the plaintiff, nevertheless, purchased in the seventy-two acres, upon the judgment and execution which he then owned.

It appears, then, that the defendant, as owner of the elder judgment, has purchased in the thirty acres on which his judgment originally attached, and the plaintiff, as owner of the junior judgment, has purchased in the seventy-two acres

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bound by his judgment, towards satisfaction of his execution.

The defendant is now pursuing an execution, under his elder judgment, against the seventy-two acres, in order to satisfy the balance due thereon; and the plaintiff seeks to prevent it, by requiring that the defendant should satisfy his execution out of the thirty acres, and which amounts to the same thing as to require the defendant to abandon his execution.

Is this one of the cases in which the court will compel the elder creditor to apply first to the thirty acres, or the fund not reached by the younger judgment? I am of opinion that it is not.

If both judgments had been against *David Stafford* only, the rule that the prior creditor must be thrown first on the fund not reached by the second judgment, might have applied. But here we have no means of knowing whether *A.* or *B.* ought to pay the debt; and it might be very unjust, as between those two original debtors, if the court should interfere, and charge the debt upon one of them, instead of the other. They are not before the court, and we have nothing in the case to guide us in making a selection between them. The consequence is, that we cannot interfere in the case.

The doctrine in a case of this kind was very clearly laid down by Lord Eldon, in *ex parte Kendal*. (17 Ves. 520.) "We have gone this length," says the Lord Chancellor; "if *A.* has a right to go upon two funds, and *B.* upon one, having both the same debtor; and the funds are the property of the same person, *A.* shall take payment from that fund to which he can resort exclusively, so that both may be paid. But it was never said, that if I have a demand against *A.* and *B.*, that a creditor of *B.* shall compel me to go against *A.*, without more. If I have a demand against both, the creditors of *B.* have no right to compel me to seek payment from *A.*, if not founded in some equity, giving *B.* for his

own sake, as if he was surety, &c., a right to compel me to seek payment of *A.* It must be established, that it is just and equitable that *A.* ought to pay, in the first instance, or there is no equity to compel a man to go against *A.*, who has resort to both funds."

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V.
MANN.

Bill dismissed, without costs.

STORM against MANN.

An injunction to stay waste will not be granted, when the right is doubtful, or where the defendant is in possession, claiming adversely, and the plaintiff has brought an action of ejectment against him to recover the possession, and the suit at law is undetermined.

THE bill stated that *John Young* was the original patentee of lot No. 55, in *Hannibal*, in the county of *Onwego*. That the plaintiff purchased the lot of *Young*, on the 5th of *November*, 1810. That the plaintiff is in possession of the south half of the lot; and the defendant, not having any lawful title to the possession of the same, has been for a long time, and is now, in possession of the north half of the lot, i. e. of 300 acres. That to recover possession, the plaintiff has brought an ejectment at law against the defendant, which was commenced in *August* term, 1817, and in which issue has been duly joined, and the action is still pending undetermined. The bill alleged that the defendant was committing waste, and prayed for an injunction to restrain it.

D. Allen, for the plaintiff, now moved for an injunction.

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THE CHANCELLOR. The title appears to be disputed; for the defendant has been in possession for a long time, and has joined issue with the plaintiff at law, on the question of title, and the action is still pending undetermined. Under these circumstances, I do not feel myself authorized to grant the injunction.

In *Field v. Jackson*, (*Dickens*, 599.) the Lord Chancellor held it to be a general rule, that when the right was doubtful, the court would not grant an injunction. So, in a case before Lord *Eldon*, (*Pillsworth v. Hopton*, 6 *Ves.* 51.) an injunction to restrain waste was not granted against a defendant in possession, claiming by an adverse title. If the plaintiff, in his bill, states such a claim on the part of the defendant, he states himself out of court, as to the injunction. In the present case, the bill does state to that effect, when it states that the defendant has been a long time in possession, and has joined issue with the plaintiff in ejectment. I must know the result of that issue at law before I can interfere.

Motion denied.

BRIGGS against LAW and others.

An agreement on the part of a creditor to collect money *rateably*, of the several parties to a note, &c. on their giving a judgment bond for the amount, enforced by injunction.

February 9th.

THE bill stated, among other things, that on the 25th of October, 1817, the agent of the *Lansingburgh* bank applied to the plaintiff, and *Mosher*, and *William Van Kirk* and *Joseph Smith*, the endorsers of two notes given to the bank, for the balance due on them, amounting to 2,230 dollars,

for security, by judgment. The plaintiff, *Mosher, Van Kirk, and Smith*, refused to give a judgment bond, unless the agent of the bank would agree, in behalf of the bank, to obtain a judgment with all reasonable diligence against *John Ashton* and *William Briggs*, two other of the makers of the notes, for the amount of the notes, and would obtain the money, in the first instance, if practicable, from *Henry Briggs*, (who, being indebted to the company, had assumed to pay the debt due to the bank, and one of the persons who had signed the notes,) and agree to collect such portions of the money, as could not be obtained from *Henry Briggs*, from the several other persons who had signed or endorsed the notes, *equally*, as far as their property would admit. That the agent of the bank accordingly agreed so to do, and the plaintiff, and *Mosher, Van Kirk and Smith*, gave a judgment bond to the bank, for the amount of the two notes, and the expenses of the arrangement; and a judgment was thereupon entered up, for 4,600 dollars, on the 30th of *October*, 1817. That the bank, on the 12th of *August*, 1818, issued execution on the judgment, for 2,344 dollars and 92 cents, with directions to levy the amount of the plaintiffs only, without having instituted any suit, or obtained any judgment against *Henry Briggs*, or against *William Richards*, who was also a maker of one of the notes. That the other parties above named have property sufficient to pay the debt. That the bank, on the 2d of *September*, 1818, assigned the judgments to the defendant *Law*, and refused to interfere to collect the debt equally of the other parties. The bill prayed, that the bank and *Law* might be enjoined from all further proceeding on the execution, and that *M. A., W. B., Van K., S., and R.*, might be decreed to contribute each *one seventh* of the first note, and *one eighth* of the second note; and that *M., Van K., and S.*, might be decreed to contribute each *one fifth* of the *costs* and sheriff's fees on the execution, &c. An injunction was accordingly issued.

The answer of four of the defendants, *L., M., A., and*

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Van K., did not deny the agreement, in substance, on the part of the bank, as stated in the bill, and one of them, *M.*, admitted it, in all its essential parts; but the answer set up matters antecedent to the judgment bond, to show that the plaintiffs, or one of them, ought to pay the debt, instead of the defendants, or any of them.

February 9th. *J. L. Wendell*, for the defendants, now moved to dissolve the injunction.

L. Mitchell, contra.

THE CHANCELLOR, without going into the consideration of the antecedent transactions, which were complicated, and the equity arising therefrom obscure and doubtful, considered that the agreement of *October*, 1817, as admitted in the answer, was binding in equity and conscience. On the fact of that agreement only, the interference of this Court was to be supported. He, therefore, ordered, that on the plaintiffs paying to the sheriff, or in Court, in twenty days, two sevenths of the debt and interest, and two fifths of the costs of the judgment and execution, that the injunction should be continued, to the end that the owner of the judgment, whether it be the bank of *Lansinburgh* or their assignee, might be compelled to collect the debt rateably from the defendants, *Mosher*, *Van Kirk*, *Smith*, *Ashton*, and *William Briggs*, in pursuance of the agreement.

Order accordingly.

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ELIZA FELLOWS against JOHN FELLOWS.

An injunction is never granted against persons who are not parties to the suit.

UPON the coming in of the defendant's answer, *Foot*, March 20th, for the defendant, moved to dissolve the injunction which had been issued in this cause, on the ground, that the answer denied the equity of the bill, and especially, that the injunction ought to be dissolved as against *Martin Adsit*, *Raymond Adsit*, and *Jesse Adsit*, who were no parties to the bill, and who were enjoined from the payment of certain notes given by them to the defendant. He cited 7 *Ves.* 267. *Iveson v. Harris*.

Huntington, contra.

THE CHANCELLOR. The doctrine in the case cited, is correct and applicable. "I find," said Lord *Eldon*, "the Court has adhered very closely to the principle, that you cannot have an injunction, except against a party to the suit. Upon a review of all the cases, I think the practice of granting an injunction against a creditor, who is not a party, is wrong. The Court has no right to grant an injunction against a person whom they have not brought, or attempted to bring, before the Court, by *subpoena*. I have no conception, that it is competent to this Court to hold a man bound by an injunction, who is not a party in the cause, for the purpose of the cause." I shall, accordingly, dissolve the injunction as against those persons who were not made parties to the suit. A purchaser was restrained, in the case of *Green v. Loupes*, (3 *Bro.* 217.) from paying

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the purchase money, on a bill by the creditors of the vendor, but the purchaser was made a party.

Order accordingly.

COUCH and others *against* The President and Directors of the ULSTER AND ORANGE BRANCH TURNPIKE COMPANY.

According to the true construction of the *act to amend the act, entitled, an act to incorporate the Ulster and Orange Branch Turnpike Company*, (sess. 40. c. 213. s. 2.) the owners of lands assessed are entitled to make the road through their own lands, under the inspection of the company, by the 1st day of *August, next after the assessment is made and completed*. The commissioners having proceeded to sell lands for the payment of sums assessed after the 1st of *August, 1817*, an injunction was granted to restrain the proceedings, so as to give the owners of lands an opportunity to commence and complete the road through their lands, within the time given by the second section of the act, according to the construction so given to the act.

But the *answer* of the defendants, being afterwards put in, from which it appeared that there had been no unreasonable delay on the part of the defendants; that they completed their assessment list on the 8th of *April, 1818*, when notice thereof was given, &c.; that on the 10th of *July*, written notice was put up along the road, for the owners of lands to make proposals for making the road, &c. until the 5th of *August*, when the commissioners were to meet and review the assessment; and that the plaintiffs did not, before that time, nor at any time afterwards, offer to make the road, the injunction was dissolved.

Jan. 19 and
25, and March
31.

THE bill stated, that by the "*act to amend the act, entitled, an act to incorporate the Ulster and Orange Branch Turnpike Company*," passed the 11th *April, 1817*, (sess. 40. c. 213. s. 1.) the Governor was authorised to appoint

three freeholders, &c. whose duty it should be, as soon as may be after the acceptance of their appointment, to make a just, equitable, and proportionate assessment on all the lands lying adjoining or contiguous to the said turnpike road, &c. That the commissioners (sec. 2.) were to make the assessment for each town separately, &c. : " *Provided*, that in lieu of the payments, &c. it should be lawful for any of the persons assessed, to make such road through his or her lands, or within the town in which his or their lands lie, *under the inspection of the P. and D. of the company, so that the same be commenced by the 1st day of August next*, and be completed within three years thereafter; for which such persons shall be allowed in his or their assessment, and in satisfaction thereof, at and after the rate of 800 dollars the mile, or such other sum as the said commissioners shall determine," &c. That on the 15th of *April*, 1817, three freeholders, &c. were duly appointed commissioners to make assessment, &c. according to the directions of the act; but that they did not make their assessments until the 7th of *August*, 1818; and by such delay deprived the plaintiffs, and the others, on whose behalf they sue, of the advantages secured to them by the proviso of the second section of the act. That the plaintiffs were advised, that they were not entitled to those advantages, unless they commenced to make the road through their lands, &c. by the 1st of *August*, 1817. That many of the persons in whose behalf the plaintiffs sue, are unable to pay the sums assessed. That in making the assessments, the commissioners have, in several instances, acted contrary to the act, and not made just and proportionate assessments. That the commissioners are required to make a map and an assessment list, and set down the lots and owners, &c. as to which several omissions had taken place. That part of the township of *Bethel* had been assessed as part of the town of *Thomson*. That on the 3d of *September*, 1818, the commissioners gave notice of the assessment list; and that the sums assessed would be

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due on the 1st of *December*, 1818, (according to the sixth section of the act,) and in case of default the lands would be sold on the 14th of *December*, at *Newburgh*. That the plaintiffs, and others, named, and whose lands are assessed, had not paid the sums assessed, &c. That they are advised that the assessment is invalid, because it was not made within the time to enable them to avail themselves of the privileges in the second section of the act; and that the assessment ought to have been made by the first day of *August*, 1817, &c.

The plaintiffs *prayed* for an injunction to restrain the defendants from proceeding to compel the payment of the assessments, and from selling, &c.

On the 10th of *December*, 1818, an injunction was granted, restraining the defendants from selling until the second *Monday* of *January*, to the end that the merits of the bill might, in the mean time, be discussed.

January 19th.

Betts, for the defendants, now moved, before answer, to dissolve the injunction, for want of equity in the bill. He contended, that according to the just and reasonable construction of the act, the words in the second section, "*first day of August next*," did not necessarily mean next after passing of the act. No time was limited by the act for making the assessment; and from the different sections, it was evident that it was never supposed that the assessments could be completed before the 1st of *August*, 1817. The third section requires six weeks notice of the assessment list, which is to remain, for the inspection of all persons interested, four weeks, so that the assessment list must be completed by the 15th of *June*, which would be altogether impracticable. So, by the sixth section, it is required that *six weeks* notice, after the assessments shall have been completed, and the maps and assessments filed, &c. should be given by the treasurer of the company, of the time the assessments are due, and the place where they are to be paid. The

eleventh and twelfth sections, also, show that the act is not to be so strictly and narrowly construed as to confine the time to the 1st of *August*, 1817. (13 *Johns. Rep.* 497. 2 *Mass. Rep.* 475. 1 *Cranch*, 299. 2 *Cranch*, 23. 52. 286. 320. *Doug.* 30. 2 *East*, 135.)

The plaintiffs do not allege that they have been misled by any misapprehension, or that they have ever applied to the commissioners for leave to make the road. They do not show any actual grievance suffered by them; but rely on a technical construction of the act. If the commissioners are not restricted to any precise time, but have a discretion to make the assessment after the 1st of *August*, 1817, there is clearly no jurisdiction in this court to interfere.

Van Vechten, and *H. Bloecker*, contra, relied on the case of *Belknap v. Belknap*, (2 *Johns. Ch. Rep.* 463.) as establishing the jurisdiction of the court in such a case as the present. There is no adequate remedy at law. The plaintiffs would be concluded by a sale; and if they could bring actions, there must be a multiplicity of suits. If the plaintiffs are to be deprived of the privilege of making the road through their own lands, it is manifestly a great grievance and injury.

THE CHANCELLOR. The persons assessed were entitled to make the road through their town, instead of paying the assessment, so that the same be commenced "by the 1st of *August* next," and completed in three years. The act meant to grant a privilege for a pretty heavy burden, and it ought not to be in the power of the company to deprive them of it, by delaying the assessment until after the 1st of *August* ensuing the passing of the act. It appeared by the bill that the assessment was not made until after the 1st of *August*, 1817; and taking the act together, and comparing one part with another, the true construction must be, that the road was to be commenced by the 1st of *August*,

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next after the assessment made. On no other construction can the privilege granted to the plaintiffs be preserved, and the act kept in force. It must, therefore, be deemed the necessary and true construction.

The following decretal order was, thereupon, entered :

" It appearing to the court, from the discussions upon the bill only, that those persons mentioned therein, are justly entitled, according to the true intent and meaning of the act, in the said bill mentioned, in lieu of payment of the sums at which they are respectively assessed, to make the road according to the provisions in the second section of the act, by commencing the same by the first day of *August next*, (which means the first day of *August, next after the assessment made,*) and completing the same within three years thereafter, it is thereupon ordered that the motion be denied, and the injunction continued until farther order," &c.

The defendants, afterwards, put in their *answer*, stating that three commissioners were appointed under the act, on the 15th of *April*, 1817, who received immediate notice of their appointment. Two of the commissioners met on the 13th of *May* following, for the performance of their duty, but declined proceeding without the other commissioner, *Kiersted*, who was a *surveyor*, and well acquainted with the lands through which the road was to run. That *Kiersted* having been previously appointed a commissioner under another turnpike act, was engaged in the summer and autumn of 1817, in the discharge of that trust, and though repeatedly requested, was unable to attend during that time, with the other two commissioners under this act, and who could not well execute their trust without a competent surveyor. That the commissioners did not *review* and *finally settle* their assessment, until the 7th of *August*, 1818, but had completed their *assessment roll* on the 8th of *April*, 1818, at which time, and on the 20th of *June*, 1819, they caused notice of the assessment list to be published according to the

act. That on the 19th of *July* last, the defendants caused a written notice to be affixed up along the whole extent of the road, giving notice to the owners of lands assessed, that they should receive *proposals* for making such parts of the said road as are not under contract, until the 6th of *August*, when the commissioners would meet, for the purpose of reviewing their assessment: that the defendants have been, at all times before and after the 1st of *August*, 1817, until they entered into contracts for making the road, ready to permit the plaintiffs and others to make the road within their lands, &c., according to the act. That the plaintiffs did not commence working the road before the 1st of *August*, 1817, nor afterwards; nor did they, at any time, offer or propose to make the road. That on the 4th of *September* last, the defendants entered into contracts with two persons for making part of the road; and on the 7th, 8th, and 10th of *October*, they entered into other contracts with other persons, for making the other parts of the road, and that the persons with whom they have contracted were assessed, and have contracted to make the road through their lands, &c.

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On the ground that the answer denied all the equity of the bill, *Batts* again moved to dissolve the injunction. March 31d.

Van Vechten, and *H. Bleecker*, contra.

THE CHANCER. When the motion was made in *January* last, to dissolve the injunction, the answer of the defendants had not come in, and the conclusion from the statement in the bill was, that the defendants, by the postponement of the assessments, had been deprived of the opportunity of making the road through their lands, or town, according to the provision in the second section of the act. The bill charged, that the commissioners did not make the assessments until the 7th of *August*, 1818, and that the delay had deprived the plaintiffs of the privilege of making the

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read, and that the defendants were proceeding to sell their lands, for default of payment of the sums assessed thereon. The construction put upon the act by the bill was, that the assessments were to be completed so as to have enabled the plaintiffs to have commenced making the road by the 1st day of *August*, next after the passing of the act, and which was, of course, the first day of *August*, 1817, as the act passed on the 11th of *April*, 1817.

By the answer of the President and Directors of the Turnpike Company, it appears that the delay in making the assessments, in 1817, was unavoidable, and was the act of the commissioners, and not of the company. That the assessment roll was made and completed on the 8th of *April*, 1818, and notice thereof immediately given according to the requisitions of the act. That on the 10th of *July*, 1818, notice was affixed up, on the part of the company, at suitable places, on the whole extent of the road, giving information to the owners of lands assessed, that they would receive proposals for making such parts of the road as were not under contract. That they have at all times been ready, until the road was put out by contract, in *September* and *October*, 1818, to permit the plaintiffs and others, to make the road within their town, or through their lands, according to the act. That no such offer or proposal was ever made to them. Indeed, the bill does not state that the plaintiffs ever intended or offered to make the road.

It would be too strict a construction of the act to hold, that if the assessment was not made and completed before the 1st day of *August*, 1817, the whole object of the act must be defeated and destroyed. The facts in this case show that it could not have been done by that day, though the Turnpike Company were guilty of no *laches*. Some time was requisite to appoint, and notice, and assemble the commissioners. An accurate survey and assessment upon so great a tract of new and uncultivated country, also required considerable time. When the assessments were made, the com-

missioners were to give six weeks notice in two papers, of which one was to be in *Orange* county, and the other in the city of *New-York*, and the parties concerned were to have one month to examine the assessments, and to make objections, if they conceived themselves aggrieved. The commissioners were to review and correct the assessments, if sufficient cause was shown, and have the maps and lists filed, and then, and not before, the assessment became a *lien* on the lands assessed.

Upon the construction given to the act, by the counsel on the part of the plaintiffs, they were not to begin to make the road until all this was done; and they contend that all this business must have been done, and the lien on the lands created, before the 1st day of *August*, 1817. I think this an unreasonable construction, for there was not sufficient time for the performance of so great a duty, and for the allowance of the six weeks, and of the one month thereafter, and of the necessary intermediate times, between the passing of the act and the 1st of *August*. We ought to adopt a construction that would enable the parties to carry the act into operation, with convenience and safety, and at the same time, secure to the plaintiffs their privilege of working the road. This can be done by construing the words, "by the first day of *August* next," in the second section of the act, to mean the 1st day of *August*, next after the assessment shall have been made. That this is the true construction of the act, appears not only from the reason and necessity of such a construction, in order to give the act due and just operation, but from the provision in the sixth section, declaring that the sums to be assessed should become due on the first day of *December* next "after the assessment hereby authorized shall have been completed." If the assessment was to be completed, at all events, by the 1st of *August*, 1817, according to the construction given by the plaintiffs' counsel to the second section, the words above

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quoted would be useless and without meaning. But we are to presume the lawgiver uses no words without use and meaning, and these words plainly imply that the assessment was not limited to the first of *August* next after the passing of the act.

If this be the true construction, the inquiry is, whether the plaintiffs have not had an opportunity to make the road, and whether they have not lost it, by not commencing the same by the first day of *August*, next after the assessment made. It appears, by the answer, that the assessment was made and completed by the 8th of *April*, 1818, and notice thereof given. The defendants also gave notice on the 10th of *July* following, that they were ready to receive proposals for making part of the road. These notices, we must conclude, duly came to the knowledge of the plaintiffs, and yet they do not pretend that they ever made proposals, or even intended to work the road under the inspection of the company. The proposals on the part of those persons who wished to avail themselves of the privilege of the second section of the act, were to be made before the assessments were reviewed and finally settled, and filed, and had become liens on the lands. I infer this from the provision in the second section, by which they were to be allowed in satisfaction of their assessment, at the rate of such a sum for each mile, *as the commissioners should determine*; and the commissioners were *functi officio*, after the maps and lists were deposited. The plaintiffs had not made any effort, nor taken a single step towards electing to make the road, or commencing the same, even down to *September* last, when the company began to enter into contracts with different individuals to make the road.

It has been said, that though the assessments were made and completed on the 8th of *April*, yet that they were not reviewed, and finally settled, until the 7th of *August*, 1818, and, therefore, the plaintiffs have to the 1st of *August*, 1819, to commence their work. This would be a very unreasona-

ble construction in this case. The plaintiffs had due opportunity before the 1st of *August*, to elect to work the road, and to object to the rate or amount of assessment. They did neither; and it is evident, from their own showing, that they did not intend to do it, for they neglected every manifestation of such an intention. They laid by silently, and suffered the 1st of *August* to arrive, and contracts to be made by the company, in *September* and *October* following, for making the road, and even their lands to be advertised, in consequence of their default, either to work or pay, before they complain. It appears to me that they have no equity to support their complaint. Their objection to the proceedings would seem, by the bill itself, to be the after criticism of counsel, and if admitted, would be oppressive upon the company, and defeat all the beneficial public purposes for which the act of incorporation was granted.

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Injunction dissolved.

FANNING against DUNHAM.

Though an *order* may be discharged by motion or petition, on proper grounds, yet the most regular course is to discuss the merits of the order upon a *rehearing*.

Where new facts are stated in a *supplemental* bill, a fresh injunction may be awarded, though the former injunction was dissolved on the merits.

J. T. IRVING, for the plaintiff, moved for leave to file *April 2d.*
a *supplemental bill*, and for an injunction to stay the sale of mortgaged premises, founded on the matter therein contained, or to set aside an order of the 7th of *December*, 1813,

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Henry, contra.

THE CHANCELLOR was strongly inclined to think the order of the 7th of *December*, 1813, erroneous; 1. Because it dissolved the injunction as to the *mortgage only*, when that, and all the other securities held by the defendant, stood on the same footing, and involved the same equity; and, 2. Because it imposed on the plaintiff as a condition of staying the dissolution, that he should bring into Court the money due on the mortgage, when the mortgage being given as a collateral security, with other securities, for many complicated dealings, the plaintiff could not well ascertain the sum. But under the circumstances of the case, he said, that the more regular and advisable course would be to discuss the merits of that order upon a rehearing, especially as it was granted in the time of his predecessor, though, perhaps, such an order *might* be discharged upon motion or petition merely. (*Newland's Pr.* 68, 69.)

But upon the new facts stated in the supplemental bill, he was of opinion, that a fresh injunction might be awarded, even though the former injunction had been dissolved upon the merits. (*Travers v. Stafford*, 2 *Ves.* 19. *Amb.* 104. *Lingham v. Toule*, 1 *Anst.* 189.)

Injunction granted.

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VAN BERGEN against DEMAREST & THOMPSON.

Where a second mortgagee was proceeding to sell the mortgaged premises under a power of sale, contained in the mortgage, the Court, as the rights of an *infant*, heir of the mortgagor, were concerned, and it appearing to be for the interest of all parties, ordered the sale to be stayed, and that it should be made under the direction of a Master, associated with the mortgagee, on giving a further notice of sale, for six weeks; and that no more of the premises should be sold than would be sufficient to pay the amount due on the mortgage, to be computed by the Master; provided a sale of a part could be made without prejudice.

THE bill of the plaintiff, who was of the age of five *April 12th.* years, filed by her next friend, stated that the mother of the plaintiff, in her life time, being seized of real estate, at the request of *D.*, her brother, who pretended that her husband, at his decease, was indebted to him, executed a bond and mortgage to the defendant *D.*, with a power of sale, to secure the debt. That *D.* assigned the bond and mortgage to *T.*, the other defendant, who was proceeding to sell the mortgaged premises, under the power. That the sum claimed to be due on the mortgage, was about 1,900 dollars, and that the mortgaged premises were worth 5,000 dollars. The bill prayed for an account, and an injunction to stay the sale, which was granted.

The defendant *D.*, in his answer, stated, that the accounts were exhibited to the plaintiff's mother before she executed the bond and mortgage; that the debt was justly due from her husband, and so admitted by her; that the balance due was 1,500 dollars, and the premises mortgaged were not worth more than 3,000 dollars, and that there was a prior mortgage for 710 dollars.

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Van Vechten, for the defendants, moved to dissolve the injunction.

Ostrander, contra.

THE CHANCELLOR considered that the answer of the defendant *Demarest*, denied all the equity of the bill, but that it would be proper and expedient, and for the interest of all parties, and especially as the rights of an infant plaintiff were concerned, that the sale in this case, under the power contained in the mortgage, should be subject to some restrictions. The counsel for the defendants consenting thereto, it was thereupon ordered, that it be referred to a Master to compute the amount due on the mortgage, and that upon the coming in of the report, the sale under the power be made under the direction of a Master, to be associated with the mortgagee for that purpose, and that a further six weeks notice of such sale be given; and that no more of the premises be sold than the Master shall deem sufficient, provided part of the premises can be sold separately, consistently with the interest of all parties concerned; and that the injunction be deemed to be modified conformably to this order.

Order accordingly.

GREEN and others *against* SLAYTER and others.

A bill was filed, in June, 1809, against a trustee for an account; and also that he should convey to the plaintiff, the *cestui que trust*, so much of the trust estate as remained in his hands, &c., describing the same to be "*divers lands in Corby's Manor, in the patent of Springfield, and certain tracts or parcels of land in Oriskany patent;*" and a supplemental bill was filed in October, 1809, praying

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an injunction against the trustee from disposing of the trust property, and that a receiver be appointed, &c. In 1808, previous to filing the bills, the trustee, in his own individual name, sold and conveyed two lots of land in *Cosby's Manor*, to *S.*, who gave to him a bond and mortgage for the purchase money, without any knowledge of the trust. In *June*, 1811, *S.* paid off the bond and mortgage to *H.*, to whom the trustee had assigned the same, in *Nov.* 1810, and without any actual notice of the pendency of the suit against the trustee, or that the lots so purchased by him were part of the trust estate: Held, that *S.* was chargeable with notice of the pendency of the suit, and of all the facts stated in the bills filed against the trustee; and that the description of the trust lands, though general, was sufficient to put him on inquiry, and, therefore, good notice to him that the lots which he had so purchased, were part of the trust estate mentioned in the bills.

But although *S.*, as a debtor to the trust estate, was chargeable with such notice of the contents of the bills filed against the trustee; yet, as the trustee, by any thing contained in those bills, was not deprived of the power of receiving payment from and discharging the debtors, *S.* was not affected by the bills, and had a right to pay the amount due on the bond and mortgage, to the trustee, or to *H.*, the assignee, and legal owner of them; no receiver having then been appointed. Nothing but notice *in fact*, will, in such a case, prevent the debtor from paying the debt to the legal owner of the bond.

THE bill stated, that in *June*, 1809, the plaintiffs filed *April 28th* their bill against *Joseph Winter*, which bill, among other things, stated, that the defendant held in trust, for the plaintiff, *T. G.*, "divers lands in *Cosby's Manor*," and in the patent of *Springfield*, and "certain parts or parcels of land in the *Oriskany* patent." That the defendant, *J. W.*, had proceeded to sell "various parts and parcels of the land lying in *Cosby's Manor*," &c. That he had in his hands contracts for lands sold; and had in his possession bonds and mortgages belonging to the trust estate, &c. That the bill prayed for a fair account, &c. of the trust estate; that so much of the trust estate as had not been sold, might be conveyed to the plaintiff *T. G.*; and that a receiver might be appointed to dispose of the trust estate, &c. That a supplemental

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bill between the same parties, filed October 14th, 1809, after stating the facts set forth in the original bill, charged the defendant, *J. W.*, with a fraudulent breach of his trust, in the sale and purchase of the *Oriskany*, &c. That the plaintiff, *T. G.*, was apprehensive that he might sell other parts of the trust estate, and assign the securities held by him in trust, unless restrained by an injunction. That lot No. 50, in *Cosby's Manor*, belonged to the trust estate, and that the defendant, *J. W.*, meditated purchasing it, under an execution issued at his instance, &c. That the plaintiffs prayed, that an injunction be issued, enjoining the defendant, *J. W.*, from selling or disposing of any of the lands and securities held by him in trust, and he be deemed to account, and that he be removed as a trustee, and a receiver be appointed; that an injunction was accordingly issued. That an amended supplementary bill was filed the 31st of January, 1810, containing some additional charges against the defendant, *J. W.*, praying an injunction for an account, and that a receiver be appointed, &c. (*Vide S. C. vol. 1. p. 26—44.*)

The bill in this suit further stated, that, in 1814, a decree was obtained in the suit above-mentioned, that *J. W.* should be removed from his trust, and the trust estates, with the securities, &c. should be conveyed and assigned to the plaintiffs, *Henry G.* and *Mary G.*, to be by them held for *Temperance G.*, &c. That this decree has been carried into effect, and; except as to the amount decreed to be due from *J. W.* to *T. G.*, exceeding 20,000 dollars, for moneys received by him, as trustee, and which he has not paid over, and represented himself as insolvent. That before the 3d of November, 1810, *J. W.*, pretending to act as trustee, sold to *David Slayter*, the defendant, small lots, No. 16 and No. 21, in *Cosby's Manor*, for 1,500 dollars, executed a deed, dated April 18, 1808, and received a mortgage to secure the sum of 1,130 dollars, payable in four annual instalments, with interest. That *J. W.*, fraudulently to appropriate the trust funds, on the 3d of November, 1810, sold and assigned the

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mortgage, for 600 dollars, to the defendant, *Hunt*, who, as well as the defendant, *S.*, had notice of the claims of *T. G.* to the lands, and of the trust, and that *J. W.* had violated the same, and that *T. G.* had instituted the suit above mentioned against him. That the other defendants pretended some claim of interest in the mortgaged premises derived under the title of *S.* or his lessors ; but that their interests, if any, were acquired with knowledge of the trust, &c. *Prayer*, that the defendant, *S.*, may be decreed to pay to the plaintiffs the money due on the mortgage, in *June*, 1809, with interest.

The defendant, *S.*,⁹ in his answer, denied all knowledge of the trust in *J. W.*, until *November*, 1811, before which time he had made full payment of the purchase money, and paid off the mortgage ; that the money was paid at different times, the last payment being in *June*, 1811 ; that until *November*, 1811, he understood and believed that *J. W.* had purchased the premises, and held the same in his own right, &c.

That until *November*, 1811, he never heard of a suit in chancery, or injunction against *J. W.*, in behalf of *T. G.* ; that he has been informed by counsel, and believes, that from the examination of the bill filed in that suit, it does not appear that the premises were a part of the trust estate, or that any complaint was made in relation to the premises, or any relief prayed as to them, or any complaint made of any abuse or misapplication of any bond or mortgage, &c., taken by *J. W.* for any of the trust estate sold by him, &c. Nor is there, in the bill, any prayer for relief, or for any injunction against the sale, collection, or assessment of any bonds or mortgages, but the whole scope and purpose of the bill is to prevent any further alienation of the real estate ; and that *J. W.* might be decreed to account and to convey such of the lands as had not been sold, upon his receiving the balance, if any, due to him. That the defendant, *S.* contract-

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ed with *J. W.* in *September*, 1807, for the premises. That the deed, dated *April* 18, 1808, was executed by *J. W.*, in his private capacity, and contained full covenants of warranty. That he paid the two first instalments on the mortgage, before the 18th of *April*, 1809; that he paid the residue to *Hunt*, (to whom *J. W.* had assigned the bond and mortgage,) on the 21st of *June*, 1811, when the same were cancelled. That he believes that the said sum of 1,349 dollars was allowed to *T. G.*, in the report of the referees, against *Winter*.

Gold, for the plaintiffs.

E. Clark, for the defendants.

THE CHANCELLOR. The question is, whether the defendant, *Slayter*, be chargeable with notice of the bill, and supplementary bill, filed in 1809, by *Temperance Green and others* against *Joseph Winter*, and of the deeds referred to in those bills; and whether such notice, if any, rendered any payments made by him after that time, upon the bond and mortgage which he gave to *Winter* in 1808, void as against the plaintiffs.

There are two objections made to the application of the doctrine of the *lis pendens* to this case.

1. That it does not appear by those bills, in 1809, whether the lands sold to the defendant, and for which he gave his bond and mortgage, were part of the property held by *Winter* in trust.

2. Nor does it appear, that it was any part of the object or subject-matter of the suit, to obstruct or divert the payment of that bond.

1. The defendant has denied notice in fact of the suit in 1809, or that *Winter* acted as a trustee, or held, as trustee, the lands which he sold to him. He says, that the first actual notice which he had of the trust, or of the suit, was

after the payment and satisfaction of the bond and mortgage which he gave to *Winter*. If he made any payments in his own wrong, subsequent to the suit of 1809, it must be in consequence of notice in law, arising from the fact of the filing of the bills in that suit. Parties have, in several instances, been made chargeable in this Court with notice of the institution of that very suit, and with all the consequences of such notice. Thus, in the case of *Murray v. Ballou*, (1 Johns. Ch. Rep. 568.) it appeared, that *Winter* had sold lands held by him in trust, to the defendant, in 1810, and the defendant was held chargeable with constructive notice of the suit in 1809, by *Temperance Green* against *Winter*, for a breach of trust, and to be responsible to the *cestui que trust* for the land or its value. The object of the bill in 1809, was to recall out of the hands of *Winter*, the lands then held in trust and unsold; and under the supplementary bill he was enjoined from selling any more of those lands. It was assumed, in that case, as a conceded fact, that the lands sold to *Ballou* were part of the property held by *Winter* in trust, and that those lands formed part of the subject matter of the bill. On this point, there was no question raised or doubt suggested, and the decision rested on broad and plain grounds of law and fact. So, in *Murray v. Finster*, (2 Johns. Ch. Rep. 155.) the sale by *Winter* to the defendant was after the filing of the bill in 1809; and the payment by the defendant to *Winter*, was after notice in fact of the suit. This was a case of responsibility, founded on the doctrine of the *lis pendens*, which was clear of all difficulty. The same thing may be said of the case of *Healey v. Finster*, (2 Johns. Ch. Rep. 158.) In *Murray v. Lylburn*, (2 Johns. Ch. Rep. 441.) the land was sold by *Winter*, in 1810, to *Sprague*, and the bond and mortgage, which were taken for the purchase money, were afterwards assigned by *Winter* to *Lylburn*. Here the doctrine was applied not merely to the purchase of the land, but to the purchaser of the securities taken upon such sale, and the

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cestui que trust had his election given him to take either. The suit of 1809, by the supplementary bill, made all the securities arising from, or relating to, the trust, one of the subject matters in litigation, and *Winter* was enjoined not only from selling any more of the trust estate, but from selling or assigning any of the securities held in trust.

In none of those suits was it ever suggested, that the lands thereby affected did not appear, by the bills of 1809, to be trust property, or part of the matter in controversy. As the land in these cases was known and admitted to be trust property, and within the intention of the suit of 1809, the original bills were never made a subject of criticism, with a view to question or disturb that matter of fact. But the counsel have now raised a point not raised or discussed in the former suits; and it is contended, that it does not appear by the original bill in 1809, or the supplementary, or amended supplementary bill, that the lots sold by *Winter* in 1808, to the defendant *Slayter*, or the bond and mortgage taken for the purchase money, were trust property, or any part of the subject matter of that suit. The defendant says in his answer, that when he purchased of *Winter*, he supposed he purchased of him in his own right. The purchase being prior to the suit of 1809, cannot be affected by it; nor do the plaintiffs question the payments which were made by the defendant to *Winter* himself, prior to the suit of 1809. There is no colour of equity to question either the sale or those payments. The object of this suit, is only to recover so much of the purchase money as the defendant paid to *Winter's* assignee, *after* the commencement of the suit in 1809.

The lands sold to the defendant, were lots 16 and 21, in the subdivision of great lots No. 83, 84, and 85, in *Cosby's* Manor, and the bill of 1809 alludes, or refers, to several tracts of land in different places and counties, and among other parcels, it mentions "divers lands in *Cosby's* Manor," which had been purchased by *William Green*, and mortga-

ged to *Heatly*, and that the mortgage was registered in the counties where the lands lay. The bill then states, that all those lands were conveyed by *Green* to *Winter*, in trust, and that *Winter* had proceeded to sell "various parts and parcels of the land lying in *Cosby's Manor*," as well as lands lying elsewhere. The supplementary bill goes further, and mentions lot No. 50 in *Cosby's Manor* as belonging to the trust estate; and this is all the specification of the trust lands in *Cosby's Manor* given by the bill. If we examine the registry of the mortgage given to *Heatly*, and which registry was referred to in the bill, we find that it only mentions "certain tracts, parcels, or lots of land in *Cosby's Manor* containing 7,200 acres;" and it refers, for the particular description and boundaries of that land, to a deed from the executors of *John M. Scott*, of the 25th of *December*, 1792. This mortgage left the lands intended in as much uncertainty as they were left by the bill, and the question recurs, whether by a bill so general in its reference to the lands in trust, the defendant ought to be charged with notice, at the time he paid off the bond and mortgage, that the lots he bought of *Winter* were part of the lands in *Cosby's Manor* held in trust by *Winter*.

The argument in favour of the defendant is, that the doctrine of notice arising from the filing of the bill, is sufficiently severe, and it is reasonable that a plaintiff who means to affect all persons with notice of the subject matter in controversy, and to prevent them from intermeddling with his right, should be obliged to state that subject or right with a certainty and precision not to be mistaken. That in this case the absolute certainty required and pointed out by the references in the bill, was to be found only in private conveyances not averred to be upon record, and to which a stranger had no legal right to demand access. On the other hand, it may be observed that when the defendant discharged his bond and mortgage in the hands of *Winter's* assignee, he was told by the bill, that "divers lands in

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Cosby's manor," were held in trust by *Winter*, and which had been purchased by him of *Green*, and that he had been selling "various parts and parcels of those lands." It is true that there might have been "divers lands in *Cosby's manor*," held in trust by *Winter*, and yet the lots he sold to the defendant have been held by him in his own absolute right. But though this was a possible, it was an improbable fact; and if ever a bill contained a sufficient matter to have put a party upon inquiry, the bill, in 1809, answered that purpose. The doctrine of the *lis pendens* is indispensable to right and justice, in the cases and under the limitations in which it has been applied; and, according to the observation of Lord Chancellor *Manners*, we must not suffer the rule to be frittered away by exceptions. Was it too much to have required of a purchaser charged with notice of all the facts in the bill of 1809, to have called upon *Winter* to disclose the source of his title? The general rule of this court is, that what is sufficient to put the party upon inquiry, is good notice in equity. (Lord *Hardwicke*, in *Smith v. Low*, 1 *Atk.* 489.) The least inquiry, even of *Winter* himself, would have satisfied the purchaser, that the lots he purchased were parcel of the trust lands mentioned in the bill. That such was the fact, is admitted by the answer; and the real objection of the party is not to the application of the rule to this particular case, but to the justice and equity of the rule itself. It is, therefore, entirely inadmissible.

2. But admitting the defendant to be charged, at the time he paid the bond, with notice; as a debtor to the trust estate, of the contents of the original and supplementary bills, the next question is, did that notice create any just obstacle to his payment of the bond? The object of the original bill was to compel *Winter* to account; and to recall out of his hands the trust lands remaining unsold. The supplementary bill went further, and prayed that *Winter* might be restrained from assigning the securities held in trust, and that they might be delivered up to the receiver who should be

appointed. If the payment of the bond to *Hunt*, the assignee, was made by the defendant, in his own wrong, it must have been in consequence of the notice contained in this supplementary bill; but it appears to me that the defendant was not affected by either of these bills. Though *Winter* was prohibited from assigning the securities, he was not, until the appointment of a receiver, prohibited from collecting the debts and rents due the trust estate; and great inconvenience and mischief might ensue, from denying him that power, by mere inference from the bill, and before the appointment of a receiver. I am not for carrying the doctrine of the *lis pendens* to the length of not only raising a notice by construction sufficient to charge a party, but of also extending the objects of the bill by construction, in order to support the notice. The validity of the sale, or of the payments to *Winter*, in this case, was not a point raised by the bill for litigation, and the case does not fall within the reason and equity of the rule. His inability to receive payment, and discharge the debtor, must have been the consequence of some subsequent and direct act of the court, or of the appointment of a receiver duly made known to the debtors. Nothing of this kind appears in the case, and the defendant was not, therefore, in the mean time, deprived of his right to pay to the legal owner of the bond.

If a payment to *Winter* would have been good, when nothing more existed to prevent it than the filing of these bills, a payment to his order or assignee, must have been equally so. The debtor had nothing to do with the breach of the injunction by *Winter*, by the assignment of his bond and mortgage to *Hunt*, nor with the effect of the suit upon the right of *Hunt* to take such an assignment. The latter might be responsible to the plaintiffs for the money so received, and yet the payment on the part of the defendant be good; because the constructive notice, arising upon the supplementary bill, was addressed to the assignee, not to the debtor. If the rule was extended further, the debtors would

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be deprived of the opportunity of discharging their debts, and relieving themselves and the land from that incumbrance. There would be no person to whom they could pay. When a receiver was appointed, then the powers of the trustee were completely suspended; and when notice of that appointment was duly given, then any subsequent payment by the debtor to the trustee would be at his peril; but until that event, the debtor had a right to resort to the legal owner of his bond, and discharge it. The debtor, in a case like this, ought to have had notice in fact.

I am, accordingly, of opinion, that the plaintiffs have no right, in equity, to compel the defendant, *Slayter*, to the repayment of any part of the bond, and that the bill, as to him, be dismissed, with costs.

Bill dismissed.

LIVINGSTON *against* OGDEN and GIBBONS.

By the declaration of the statute, passed *April* 6th, 1808, (1 *N. R.* L. 238. sess. 31. c. 135.) as well as by immemorial usage, the whole of the *Hudson* river, southward of the northern boundary of the city of *New-York*, and the whole of the bay between *Staten Island* and *Long* or *Nassau-Island*, are within the jurisdiction of this state: Therefore, where the legislature had granted to *L.* and *F.* the exclusive privilege of navigating *steam boats*, "in all creeks, rivers, bays, and waters whatsoever, within the territory or jurisdiction of this state," *all the waters lying between Staten-Island and Powles Hook and the Jersey shore*, were held to be within the jurisdiction of the state, either as part of the *Hudson* river or the bay; and an injunction was issued to restrain persons from navigating those waters with *steam boats*, in violation of such exclusive privilege granted to *L.* and *F.*

May 3d.

THE bill stated, that the legislature, by an act of the 27th of *March*, 1798, granted an exclusive privilege to *R.*

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R. Livingston, of using steam boats "in all creeks, rivers, bays, and waters, whatsoever, within the territory or jurisdiction of this state," for fourteen years, &c. That by the act of the 5th of April, 1803, the privilege was granted to *R. R. Livingston* and *Robert Fulton*, for twenty years. That they complied with the terms upon which that privilege was granted. That by an act of the 6th of April, 1808, the privilege was extended for thirty years, and that if any person violated that privilege, by navigating any steam boat, without their license, "upon the waters of this state, or within the jurisdiction thereof," they should forfeit such boat. That by an act of the 9th of April, 1811, injunctions were to be awarded to protect the privilege, &c. That on the 20th of August, 1808, *Livingston* and *Fulton*, by deed, granted to the plaintiff the right they possessed to navigate steam boats, "from any place within the city of *New-York* lying to the south of the State Prison, to the *Jersey shore* and *Staten Island*, viz. *Staten Island*, *Elizabethtown Point*, *Amboy*, and the *Raritan* up to *Brunswick*, but to no point or place north of *Powles Hook ferry*." That on the 5th of May, 1815, the plaintiff granted to the defendant *Ogden* permission to run a steam boat between *Elizabethtown Point* and *New-York*, for ten years; and the defendant *Ogden* agreed that he would not, directly or indirectly, be concerned, during the term, with any steam boat, to run to or from any other place within the grant of the plaintiff. That the defendant *Gibbons* is the owner of a steam boat, called the *Bellona*, and without license, and contrary to the right of the plaintiff, employs it to run between *Elizabethtown Point* and *New-Brunswick*; and has lately navigated the waters of this state, between *Elizabethtown Point* and *Powles Hook*, and between *Powles Hook* and *New-York*. That the defendant *O.* hath combined with the defendant *G.* to violate the right of the plaintiff. That the defendant *O.* is the owner of a steam boat called the *Atalanta*, and the two defendants have agreed to employ these two boats.

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in conveying passengers between *New-York and Brunswick*, to wit, the *Atalanta* navigating between *New-York and Elizabethtown Point*, and the *Bellona* between that place and *Brunswick*; and that the defendants have agreed to exchange passengers at *Elizabethtown Point*, and have appointed one *William B. Jaques*, their common agent in *New-York*; to receive the passage money for the whole route, and he has given notice of such an arrangement. Prayer for an injunction, to restrain the defendants from navigating the said two boats, except from *New-York to Elizabethtown Point &c.*

The answer of *Aaron Ogden* stated, that the ports and harbours of *Elizabethtown Point* and *Brunswick*, are within the jurisdiction of *New-Jersey*. That the waters lying between those points are equally so; and he denied that such navigation is in contravention of any law of *New-York*. That the grant to *Livingston* and *Fulton* was only as to waters exclusively within the state of *New-York*. That neither the grant to them, nor to the plaintiff, ever gave any exclusive right to navigate steam boats between one port in *New-Jersey* and another port in *New-Jersey*. He denied all agreement and combination with the defendant *G.*, or that *Jaques* is his agent, or the joint agent of him and the defendant *G.* The defendant admitted, that passengers are conveyed on board his boat, when running in her usual course from *New-York to Elizabethtown Point*, and are then and there received on board the *Bellona*, and conveyed to *New Brunswick*; but he denied that this was any violation of his agreement with the plaintiff. That he had no concern with, or interest in, the boat of the defendant *G.*

The defendant, *Gibbons*, in his answer, admitted the statutes, and the derivative right of the plaintiff, but denied that he acquired any exclusive right to navigate by steam boats to the *Jersey shore*, at *Powles Hook, Elizabethtown, Amboy, &c.* He admitted, that the plaintiff runs a steam boat, called the *Olive Branch*, from *New-York to Bruns-*

wick, but denied that the plaintiff has any exclusive right so to do. He admitted, that he owned a steam boat called the *Bellona*, and that she runs between *Brunswick and Elizabethtown Point*, and that she has occasionally been continued to *Powles Hook*, and returned again, without navigating any waters *exclusively* within the state of *New-York*. That the boat runs from one port in *New-Jersey* to another port in *New-Jersey*. That he has a coasting license under the *United States*. That on the 11th day of *April*, inst. his boat ran *once* from *Powles Hook* to the city of *New-York*, under a license from the *Jersey* steam boat company, since expired, and that the boat has not run on the exclusive waters of *New-York* on any other occasion. He denied all agreement or combination with the defendant *Ogden*, or that *Jaques* is their common agent or the agent of this defendant, to collect money from passengers, &c. He denied that the notice was ever published by his authority.

A motion was made in behalf of the plaintiff, for an injunction to restrain the defendants from using their steam boats, &c.

T. Sedgwick, and *H. Bleeker*, for the plaintiff.

J. V. Henry, for the defendant *Ogden*.

Scudder, (of *New-Jersey*,) for the defendant *Gibbons*.

THE CHANCELLOR. This case brings up the question of territorial jurisdiction.

By the act of the legislature of this state, passed the 6th of *April*, 1808, entitled, "an act relative to the jurisdiction of this state, over the territory therein mentioned," the jurisdiction of this state is declared and asserted over "the whole of the river *Hudson*, southward of the northern boundary of the city of *New-York*, and the whole of the bay between *Staten Island* and *Long* or *Nassau Island*."

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All the water that lies between *Staten Island*, and *Powles Hook*, and the *Jersey* shore, would seem to be comprehended in the above limits, as being either a part of *Hudson* river, or of the bay. It belongs either to the one or the other, and so far, therefore, as the steam boat *Bellona* has navigated between *Staten Island* and *Powles Hook*, she has navigated upon the waters within the jurisdiction of this state, and in violation of the exclusive right granted to *Livingston* and *Fulton*, and by them, in respect to those waters, to the plaintiff. The act referred to, declares it to be "the duty of all officers, according to their respective powers, authorities, and functions, to preserve, maintain, and defend the jurisdiction of this state, in and over the said territory, until this state shall be evicted thereof by due course of law." But the exclusive jurisdiction of this state does not appear to be asserted and declared to the water of the sound that lies between *Staten Island* and the state of *New-Jersey*. And I do not think that I am warranted, and it certainly is not my inclination, to extend the exclusive privilege of navigating boats by steam, granted by the legislature of this state, beyond the injunctions of the law, or so far as to interdict the defendant *Gibbons* from navigating a steam boat through that sound, between *Elizabethtown Point* and *Amboy*. But as to the waters between *Powles Hook* and *Staten Island*, and which are clearly a part of the waters of *Hudson* river, or of the bay of *New-York*, the jurisdiction of the state must be as entire and perfect as to any part of the waters on *Hudson* river. The jurisdiction must be absolute and exclusive, if any jurisdiction exists; and the declaration of the statute, as well as immemorial usage, have left no discretion in our Courts on that point.

I shall, therefore, deny the motion as against the defendant *Ogden*, who navigates his boat under authority from the plaintiff, and who does not appear, in any instance, to have exceeded that authority; and I shall grant the motion as against the defendant *Gibbons*, so far only as to enjoin

him from navigating the waters in the bay of *New-York*, or *Hudson river*, between *Staten Island* and *Powles Hook*.

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Order accordingly.

**VARICK against THE MAYOR, ALDERMEN, and COMMON-
ALTY of the CITY OF NEW-YORK.**

Where the plaintiff, and those under whom he claims, have been in the quiet and uninterrupted possession of a lot of land, for *twenty-five years*, and upwards, the *Corporation of the City of New-York* cannot, under pretence that the buildings or fence on such lot, stand or encroach on a part of the public street or highway, enter upon, or disturb the plaintiff in the enjoyment thereof; and an *injunction* issued to restrain the *Corporation* from entering upon, digging, throwing down, or destroying, the ground so possessed by the plaintiff, was continued, and made perpetual, or until the *Corporation* should have established, by due course of law, their right to the ground in question.

Such an injunction, however, does not interfere with any right which the defendants may have to dig down the public street, close to the line possessed by the plaintiff, though such digging may, by necessary consequence, cause the soil of the plaintiff to fall into the excavated street.

THE bill stated a regular seisin and possession, by the plaintiff, and those under whom he claimed, to the premises described, and situated in the *eighth ward* of the city of *New-York*, and that the same had been *inclosed and improved by him and them, with buildings, &c. for upwards of twenty-five years last past*. That among other improvements, a stable, and board fence, and grates-houses, had, for that length of time, been erected on the northerly side of the premises, and adjoining to *St. David-street*. That the

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part of *St. David-street* opposite the premises had never been conveyed to the defendants, but the soil and freehold were in the original owner, and his heirs and assigns. That the defendants had recently commenced digging out that part of *St. David-street*, opposite the northerly end of the premises, and have extended the digging into the plaintiff's premises, and threaten to continue it, for ten feet, into the ground of the plaintiff, which will destroy the stable and green house, and fence, and land marks, &c. Prayer for a perpetual injunction, and an account of the damages sustained.

The corporation, by their answer, insisted that *St. David-street* belonged to the people of the state, or to the corporation, and admitted the possession of the plaintiff, for some years past, and that his buildings and fences, on the north-east end of his block of land, were, as they allege, on the street, from two feet eight inches, to ten feet six inches. They denied that any possession will give the plaintiff a right against the people, or the defendants having a right to regulate and use the streets. The defendants did not allege any express cession of the street to them, but insisted that certain acts of the former proprietors, in laying out the streets, amounted to a cession of them, in law, to the people, and through them, to the corporation. The defendants denied that they had dug within the inclosure of the plaintiff, but avowed their intention to pursue the regulation of an ordinance of *July, 1807*, in respect to *Bleecker* (formerly *St. David*) street, and to dig out the street opposite the inclosure of the plaintiff; and that they believed it would subvert the stable, green-house, and fence of the plaintiff. They insisted that the plaintiff had encroached on *St. David-street*, as originally laid out.

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The cause was brought to a hearing on the pleadings and proofs.

T. A. Emmet, Wells, and Riggs, for the plaintiff.

O. Edwards, and P. A. Jay, for the defendants.

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THE CHANCELLOR. It appears to be admitted as a fact, that the plaintiff, and those under whom he claims, have had uninterrupted possession of the premises, claiming them as their own, up to the extent of their possession north, for upwards of 25 years, before the filing of the bill; and that the stable, fence, &c., were, during all that period of time, standing on the line on *St. David-street*, to which he claims. After such a length of time, it is right and just that the plaintiff should be protected in the enjoyment of his property, and that he should not be disturbed by any act or entry of the corporation of the city, under the pretence or allegation that the fence and buildings stand or encroach on part of the public highway. The defendants must first acquire possession of the ground in dispute, not by forcible entry, but by the regular process of law, before they can be permitted to use it as a street. The injunction which was granted upon the filing of the bill, went no further than to restrain the defendants from entering upon, and digging, and throwing down, and destroying, the land *so possessed by the plaintiff*. The injunction was not intended to interfere with the defendants in digging down the street close up to the line possessed by the plaintiff, though such digging might, by necessary consequence, cause the soil of the plaintiff, consisting of sand and gravel, to fall in upon the excavated street.^(a) Whatever might be the rights of the parties,

(a) In *Punton v. Holland*, (17 Johns. Rep. 92.) the Supreme Court decided that a person about to erect a house contiguous to another, may lawfully sink the foundation of it below that of his neighbour's house, and is not liable for the damage which his neighbour may sustain, in consequence of it, provided it was unintentional, and he had used reasonable care and diligence in digging on his own ground, to prevent any injury to his neighbour. In *Thurston v. Hancock*,

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growing out of such a fact, it was not the purpose of the injunction to interfere with such a case. The principle upon which the injunction, so modified, is to be upheld, is, that after a claim of right, accompanied with actual and constant possession, for twenty-five years, and upwards, the corporation of *New-York* cannot be permitted, without due process of law, to enter upon the possession of the plaintiff, and pull down buildings, fences, &c. under their right to regulate highways.

The injunction must be continued and made perpetual, or until the defendants have established, at law, their right to the ground in question.

Order accordingly.

(12 *Tyng's Rep.* 220.) where the plaintiff had built a house on his own ground, within two feet of the line, and ten years after, the owner of the adjoining land dug so deep into his own land as to endanger the house of the plaintiff, who was obliged to pull it down, the Supreme Court of Massachusetts held, that the plaintiff could not maintain an action for the damage to his house; and that a person who builds a house adjoining his neighbour's land, ought to foresee the probable use by his neighbour of his own land, and take care in building his house, to guard against any consequence which might arise. But, on the authority of *Rolle*, (2 *Abridgment*, 565, (I.) they held that the defendant was answerable for the direct consequential damage arising to the plaintiff from the falling of his natural soil, into the pit dug by the defendant. (1 *Sid.* 167. 1 *Comyn's Dig.* 315. *Action upon the case, and for a nuisance*, (C). But if no action will lie where the house of the plaintiff falls down, in consequence of the defendant digging in his own ground, on what principle can the plaintiff maintain an action, because some of his soil has fallen into the pit dug by his neighbour? Must there not be, in either case, malice, negligence, or misconduct on the part of the defendant, in order to sustain an action? If the defendant exercise his lawful right, without any fault on his part, the damage which the plaintiff may sustain, in consequence, is not justly imputable to the defendant, but is to be considered a mere casualty, or *damnum absque injuria*.

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An endorsement or label, specifying particularly the cause of the attachment, is not necessary, where the writ is issued for a contempt, in disregarding an injunction; for the party attached is not to be bailed by the sheriff, but is to be brought forthwith before the Chancellor, to answer specific charges, who will order him to be bailed to appear, from day to day, until the party complaining has prepared the interrogatories, on which he is to be examined before a master.

The waters between *Staten Island* and the *Whitehall Landing*, in the city of *New-York*, are part of the *Bay of New-York*; and using them with a steam boat is a violation of an injunction prohibiting the navigating with such boat "the waters of the *Bay of New-York*, or in the *Hudson River*, between *Staten Island* and *Powles Hook*."

AN injunction was awarded in the case of *John R. Livingston v. Aaron Ogden and Thomas Gibbons*,* prohibiting the said *Gibbons*, and his agents and servants, from "navigating with any boat or vessel, propelled by steam or fire, the waters in the *Bay of New-York*, or in the *Hudson river*, between *Staten Island* and *Powles Hook*."

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July 1.
• Vide ante,
p. 48.

The injunction was duly served on *Vanderbilt*, as master of the steam boat *Bellona*, belonging to *Gibbons*, and on several of the persons employed in her. On the 21st of *June*, *Hoffman*, the counsel for *J. R. Livingston*, moved for an attachment against *Vanderbilt*, and against *John Frost*, and *John Berbank*, on the following affidavits:

1. The affidavit of *William Wood*, stating, that the *Bellona* arrived on *Sunday*, the 20th of *June*, at the city of *New-York*, with passengers taken on board at *New-Brunswick* and *Elizabethtown Point*, in *New-Jersey*, and from the wharf of *D. D. Tompkins*, at *Staten Island*. That the passengers were landed at the *Whitehall* wharf, near the battery, and that the said *Gibbons* came in the boat to *New-York*.

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2. The affidavit of *John Carleton*, stating, that on the 20th of *June*, he saw the *Bellona*, while on her passage from *New-Brunswick*, stop at *Elizabethtown Point*, and take in passengers for *New-York*. That she sailed in company with the *Olive Branch*. That she stopped at the wharf of *D. D. Tompkins*, on *Staten Island*, and there took in other passengers, and carried the same to, and landed them and the other passengers in, *New-York*. That the boat, on the same day, received passengers at *New-York*, and transported them to *Staten Island*, and again, on the same day, took in other passengers from *Staten Island*, and landed them in *New-York*, and took in other passengers at *New-York*, and transported them to *Staten Island* and *Elizabethtown Point*. That *Cornelius Vanderbilt* was captain of the boat, and *John Frost*, engineer, and *John Berbank*, pilot, during the period aforesaid. That *Gibbons* came in the boat, on that day, to *New-York*.

The attachment was issued, in the first instance, without a previous rule to show cause.

June 30th.

On this day, *Cornelius Vanderbilt* was brought before the Chancellor, at his dwelling house in *Albany*, by the sheriff of *New-York*, under the above process.

Van Vechten and *Henry*, in behalf of the prisoner, moved for his discharge: 1. Because, the attachment being general in the body of it, did not specify the nature or cause of the contempt, and had no endorsement or label in which the suit or cause of the attachment was particularly stated. The words of the attachment were, that the sheriff "attach, &c. so as to have the party before the court forthwith, to answer touching a certain contempt alleged to have been committed."

2. Because, the prohibition in the injunction only extended to the waters between *Staten Island* and *Powles Hook*, and not to the navigation charged.

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THE CHANCELLOR. In the case of ordinary contempts, where an attachment is used to enforce appearance, or an answer, the body of the process is still general, as in this case, but the suit and the cause of the attachment are endorsed on the writ, or appear in a label annexed, so that the party may at once comply, without application to the Court. (*Hinde's Pr.* 102, 103. 1 *Fowler's Ex. Pr.* 123.) But for extraordinary contempts, or wilful and direct violations of the process and powers of the court, where it is necessary that the party should be brought forthwith before the court, and is not to be bailed, there is no need or use of a label designating the case. The sheriff is not required to take bail upon attachment from Chancery. The case is not within the statute. It is settled at law (*Str.* 479. *Anon.* 2 *Sasnd.* 59. b. note 3.) that the sheriff cannot take bail on an attachment, though a judge at chambers may. In Chancery there is still less necessity for bail, as the court is always open, and the party may be brought in, at any time. The sheriff, on an attachment from Chancery, ought to bring the party into court without delay, and so it was understood in the case of *Studd v. Acton*, (1 *H. Black. Rep.* 468.) where it was decided by the C. B., after argument upon demurrer, that the sheriff was not required to take bail under process of attachment from Chancery, though it had been the usage to take bail in forty shillings. (*Danby v. Lawson*, 1 *Eq. Cas. Abr.* 351.) The old rule in chancery would seem to have been conformable to this decision of the C. B., and to be, that the party was not bailable by the sheriff upon attachment. (*Gilbert's Eq. Rep.* 84. *Prec. in Chancery*, 331. S. P.)

Of what possible use would a label be to the party? It might apprise him generally of the cause of complaint; but on his coming in, he may be bailed by the court to appear, *de die in diem*, until the party complaining has prepared his

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interrogatories; and he is entitled, as soon as he appears, to know the specific grounds of complaint.

When an attachment issues, after a rule to show cause, (which is the usual and the safer course,) the party is duly apprised of the offence charged. If it be peremptory and absolute in the first instance, the party must appear forthwith, and answer specified charges; so that in any view of the case, the objection to the process appears to be groundless. It always rests in the discretion of the court, whether the rule for an attachment shall be absolute, or *nisi*. If the contempt appears, as it did in this case, on the affidavits, to be direct and palpable, wilful and extreme, the process frequently issues in the first instance. The doctrine at law, on this point, was declared in the Supreme Court, in *The Matter of Stacey*, (10 Johns. Rep. 328.) and the *English* authorities were referred to. The power of this Court is the same, and may be exercised more conveniently for the party, seeing that the court is always open.

Nor does there appear to be any weight in the second objection taken to the process. The affidavits stated a clear violation of the injunction which extended to the waters in the Bay of New-York; and the waters between Staten Island and Whitehall landing, at the city of New-York, clearly form part of the bay.

These preliminary objections being overruled, the sheriff was directed to bail the party in 100 dollars, to appear, from day to day, and not to depart without leave; and the plaintiff was directed to exhibit and file interrogatories in four days, and the party to be examined thereon before a Master.

July 1st.

The case came on to be heard upon the answers to the interrogatories taken before a Master, and was argued by the same counsel who argued the preliminary motion.


The party admitted, that on the 4th of June, he was served with the injunction, and denied that he had violated

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it, or intended to do so, in any respect. That he had assisted to navigate the steam boat *Bellona* on Sundays only, (commencing on the 13th or 20th of June,) from the wharf of *D. D. Tompkins*, on *Staten Island*, to *New-York*, and back again, "in consequence of the said *D. D. Tompkins* having hired the said boat *Bellona* to run, under his authority, as his boat, and on his ferry and steam boat right, under a charter party or written agreement made and delivered by him to the owner of the steam boat *Bellona*, in presence of the deponent, whereby the said *D. D. Tompkins* hired her for *Sundays* only for one month."—"That he understood and believes, that the said *D. D. Tompkins* owns the sole and exclusive right from the representatives of *R. R. Livingston* and *R. Fulton*, deceased, and from *J. R. Livingston*, the above plaintiff, &c. to navigate with boats propelled by fire or steam from *Staten Island* to *New-York*. That the owner of the *Bellona*, after receiving the charter party or written agreement, instructed and directed the deponent to run the boat on that route, on *Sundays* as aforesaid, as the boat of the said *D. D. Tompkins*, and subject to his directions, as to hours, route, and passengers. That the deponent had, in no instance, otherwise navigated, or assisted to navigate, the *Bellona*, since the service of the injunction, on the waters prohibited by it."

THE CHANCELLOR considered that the defendant had sufficiently cleared himself of the contempt, and that the boat *Bellona* was, on the day mentioned, the hired boat of *D. D. Tompkins*, and not in the employment of *Gibbons*; and that the defendant was, *pro hac vice*, the agent or servant of *D. D. Tompkins*, and not of *Gibbons*, against whom the injunction was awarded. That the rights of *D. D. Tompkins* were not now to be tried, and no fraud or collusion, on purpose to evade the injunction, was averred or suggested.

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ORDERED, that the defendant be discharged from the attachment, with costs ; and that as to the other persons named therein, and not yet taken, the attachment, also, be deemed discharged.

Order accordingly.

CHAMPLIN *against* FONDA AND LANSING.

Where a *solicitor* files a bill in *propria persona*, a notice served on his agent, as a *solicitor* of the Court, is good service.

July 6th.

THE plaintiff in this case was a solicitor of the Court ; and a question having arisen as to the service of a notice on him, the CHANCELLOR said, that where a solicitor of the Court files a bill in *propria persona*, as plaintiff, a notice served on his agent, as a *solicitor* of the Court, should be deemed a good service on him as *plaintiff*.

WASHINGTON and WARREN BANK *against* The FARMERS' BANK and another,

The defendants, a banking company, agreed with B. of New-York, that they would, once in each week, assort and make up into a package, all the bills of the plaintiffs, a Banking Company, which should be in the possession of the defendants, and direct them to B., and hold the same subject to his order, or deposit the same as he should designate ; and B. agreed, that at the time of making up such package of bills, the defendants might draw on him for the amount, payable in New-York, at ten days sight, and promised to accept the drafts, at the same time directing the packages to be deposited in the F. and M. Bank, in Albany. The agreement con-

tised to be performed by both parties, until the 22d of *June*, 1819; and on the 25th of *June*, the defendants refused to take any more of the bills of the plaintiffs, having in their possession the bills of the plaintiffs to the amount of 10,150 dollars, which *B.* assigned to the plaintiffs, and the defendants had notice of the assignment, and for part of which amount, the defendants had drawn on *B.* who accepted their drafts, but the payment of them was not averred. On a bill filed, stating the above facts, and praying that the defendants might be compelled to deliver the bills to the plaintiffs, and for an *injunction* to prevent their putting them into circulation, or demanding payment of them;

It was *held*, that there was no ground for an *injunction*, and that where the right to demand payment is suspended by the promise of a third person, the suspension ceases, when that third person is in default; and that the agreement set forth did not discharge the plaintiffs from their obligation to pay, but merely suspended the right to demand payment, until 10 days after the acceptance of their drafts by *B.*

THE bill stated, that in *August* last, an agreement was *July 12th.* entered into between the defendants and *Jacob Barker*, of *New-York*, by which they agreed, that they would, once in each week, assort and make up into a sealed package, all the bills of the plaintiffs which should, from time to time, be in the possession of the defendants, and direct the same to *Barker*, and hold the same subject to his order, or deposit the same, as he should designate, to the end that the same might be speedily remitted to him; in consideration whereof, he agreed that the defendants, at the time of making up such packages, might draw on him for the amount thereof, payable in the city of *New-York* at ten days sight, and which drafts he promised to accept; and he, at the same time, directed the packages to be deposited in the *Farmers' and Mechanics' Bank* at *Albany*. That the agreement was indefinite, and to be revoked by either party, on due notice. That the defendants complied with it weekly, until lately, and *Barker* paid the drafts until the 22d of *June* last. That the agreement has never been revoked; but on the 25th of *June* last the defendants declined receiving the bills of the plaintiffs, and had, at that time, a large quantity of those

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bills, amounting to about 10,150 dollars. That the same had been received between the 4th and 24th of *June*. That the defendants, by the agreement, were bound to have made up the notes in packages, and deposited the same, &c., and to have drawn, &c. as aforesaid, &c. That of the said sum, 3,000 dollars were in the hands of the defendants, on or before the 11th of *June* last; and on that day the defendants did make up that sum into a sealed package, directed to *Barker*, and drew on him at ten days sight for that sum, which draft *was accepted*; and that the further sum of 3,650 dollars, of the said sum of 10,150 dollars, was received by the defendants, between the 11th and 18th of *June*; and that on the 18th of *June*, the defendants made the same up into a package, and drew on *Barker* for the same, *which he accepted*. That 3,500 dollars, being the residue of the 10,150 dollars, was received by the defendants after the 18th, and before the 25th of *June*, and whether they were made up and drawn for, the plaintiffs did not know. That the said packages were not deposited in the *Farmers' and Mechanics' Bank* at *Albany*. That on the 25th of *June*, *Barker* assigned to the plaintiffs the bills of the plaintiffs, as aforesaid, to 10,150 dollars, *being the bills so in possession of the defendants*, of which assignment notice was given to the defendants on the 29th of *June* last. The bill charged, that the defendants refused to deposit the 10,150 dollars in *Albany*, according to the agreement, or to deliver the same to the plaintiffs, and *prayed* that the defendants may deliver those bills to the plaintiffs, and be *enjoined* from issuing the said bills, or putting them in circulation, or from demanding payment of the plaintiffs.

R. Skinner, for the plaintiffs.

Per Curiam. Motion for an injunction denied: 1. The agreement with *Barker* had no consideration, to warrant the extraordinary powers of this Court. 2. The ten days

have elapsed since the acceptances charged were made, and payment is not offered or averred. If the right of the defendants to demand payment was suspended by the *promise of a third person*, it ceases when that person is in default. The plaintiffs, as his assignees, pray that the defendants may not demand payment. No request could be more unreasonable. The agreement with *Barker* did not discharge the plaintiffs from their obligation to pay their notes. At most, it only suspended the right of demand, for ten days.

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BRINCKERHOFF and others against LANSING and others.

Where a prior incumbrancer witnesses a subsequent conveyance or mortgage, knowing its contents, and does not disclose his own incumbrance, but intentionally suffers the party dealing with his debtor to remain in ignorance, such prior incumbrancer will be postponed, or barred.

This rule, however, does not apply where the prior incumbrance is duly *registered*, for then the subsequent purchaser or mortgagee is charged with notice.

To affect the right of such prior incumbrancer, mere silence is not sufficient; there must be actual fraud charged and proved; such as false representations or denial, upon inquiry, or artful assurance of good title, or deceptive silence when information is asked. And the burden of the charge and proof of fraud lies on the purchaser or subsequent mortgagee.

B. executed a mortgage to *L.*, dated *September 7th, 1802*, with a *proviso* for the payment of fifteen hundred dollars, with interest, according to the condition of a certain bond executed by *B.* to *L.* of the same date; which bond was conditioned "to pay 1,500 dollars, with lawful interest, on or before the 7th of *March, 1803*, or keep *L.* harmless, and pay up the note endorsed by *L.* for *B.* in the *Farmers' Bank*, when the same should be called for." The note referred to in the bond was made payable in *fifty-six days*, and dissolved. IV.

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counted at the *Farmers' Bank*, for *B.*; and at the end of the fifty-six days was renewed by another note made and endorsed in the same manner, and so was continued to be renewed, *toties quoties*, for above nine years, the *calls* of the bank being from time to time paid by *B.*, and the note reduced, at various times, to 900, 700, 600, and 400 dollars, and again raised, on subsequent renewals, to 1,000 dollars, and 1,300 dollars, until *October 8th*, 1811, when the last note so given in renewal, and endorsed by *L.*, being 720 dollars, was protested for non-payment, *B.* having become insolvent, and *L.*, as endorser, was compelled to pay the note: *Held*, that the bond of *B.* being intended as an indemnity against the debt due to the bank, originally created by the loan on the note for 1,500 dollars, so long as that note should continue, under the customary renewals at the bank, the mortgage remained a valid security for such debt, so kept alive in the bank, in whole or in part, by these customary renewals, during all that period, and for the sum of 720 dollars, being the amount of the last note so made and endorsed by the parties, and discounted by the bank; as the mortgage, with a reference to the bond, was sufficient to apprise a subsequent purchaser or mortgagor of the nature of the debt secured.

On a bill to redeem, further time is not usually given for the payment of the money.

And where a bill is filed by several persons, as owners of the equity of redemption in the property mortgaged, in different proportions, the proceedings of the mortgagee under a power of sale contained in the mortgage, will not be suspended or delayed, until the plaintiffs have settled the question as to the rateable proportion which each of them is to contribute towards the redemption.

But if the plaintiffs pay into Court the mortgage debt, with the interest and costs, the suit may be retained, for a reasonable time, to enable them to proceed against one of the defendants, who had, also, an interest in the equity of redemption, to compel him to contribute his proportion of such debt and interest.

July 19th.

THE bill, which was filed the 4th of *February*, 1812, by *John Brinckerhoff*, *Nathan Morey*, and *Aaron Wilcox*, against *Levinus Lansing*, *Otis Bates*, and *James Adams*, stated, that *Russel Forsyth* obtained a judgment against the defendant, *Bates*, on the 5th of *December*, 1810; and that by virtue of a *fi. fa.* issued thereon, a house and lot in *Lansingburgh*, was sold to the plaintiff *B.* for 1,100 dollars, and

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a deed accordingly executed to him by the sheriff, dated *December 14, 1811*. That the plaintiff *B.*, and *G. H. Van Wagenen*, recovered a judgment against the defendant *Bates*, on the 28th of *January, 1811*; and in order to secure this debt in part, the plaintiff *B.* made the purchase above mentioned, at the sheriff's sale. That the defendant *Bates*, pretending to be seised of the lot in *L.*, on the 20th of *March, 1811*, sold and conveyed the same, in fee, to *Clarke Bates*, who, on the 2d of *January, 1812*, sold and conveyed the same to the plaintiff *Wilcox*. That the defendant *Bates*, on the 5th of *June, 1804*, leased a lot in *Lansingburgh* to *John Morey*, for sixteen years, the execution of which lease was witnessed by the defendants *Lansing* and *Adams*, who were acquainted with its contents. That *J. L. Lansing*, son of the defendant *L.*, on the 8th of *June, 1804*, leased the said lot to *John Morey*, for ever, and the execution of the lease was witnessed by the defendants *L.* and *A.*, who knew of its contents. That *Charles Morey, David M.*, and the plaintiff *N. M.* obtained a judgment on the 9th of *February, 1810*; and under an execution on that judgment, the sheriff sold the lot, last mentioned, to the plaintiff *N. Morey*. That on the 3d of *April, 1806*, a judgment, by confession, was entered up against the defendant *Bates*, in favour of the defendant *Lansing*, to indemnify him, as endorser of the notes of the defendant *B.*, and which notes were, afterwards, discharged. That on the 7th of *September, 1802*, the defendant *Bates*, executed a mortgage to the defendant *Lansing*, of two pieces of land, in *Lansingburgh*, to secure the payment of a bond of the same date, conditioned, as appeared from the evidence, "to pay 1,500 dollars, with lawful interest, on or before the 7th of *March, 1803*, or keep the said *L.* harmless, and pay up the note endorsed by the said *L.*, for the said *B.*, in the *Farmers' Bank*, when the same should be called for," and which mortgage, it appeared, was duly registered the 7th of *September, 1802*. That the lots purchased by the plaintiffs *B.* and *M.*, as above mentioned,

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were part of the mortgaged premises. That a judgment, by confession, was entered up on the 11th of *July*, 1811, in favour of the defendant *L.*, against the defendant *Bates*, and by virtue of a *fi. fa.* issued thereon, the personal estate of *B.* and the residue of the mortgaged premises, not owned by the plaintiffs, were purchased by the defendant *Adams*. That the defendant *L.*, without reviving the judgment first above mentioned, sued out a *fi. fa.*, which was levied on the lands so owned by the plaintiffs *B.* and *W.*, and had also advertised them for sale, under the mortgage, with intent to force the plaintiffs *B.* and *W.*, to satisfy the mortgage. That if any thing is due on the mortgage, it ought to be paid to the plaintiffs *B.* and *M.*, and to the defendant *A.* rateably. The bill sought a discovery of the notes for the indemnity against which the mortgage was given; and prayed for general relief, and that the defendants be enjoined from selling the premises under the *fi. fa.*, or under the power contained in the mortgage, &c.

From the answer of the defendants *B.* and *L.*, and the evidence taken in the cause, it appeared that the note endorsed by the defendant *L.*, and as indemnity against which the bond and mortgage was given by *B.*, was dated the 7th of *September*, 1802, payable in *fifty-six* days, and discounted at the *Farmers' Bank*, for the defendant *B.* When the note fell due, it was taken up by a new note, drawn and endorsed by the same parties; and the note was so renewed, at the end of every 56 days, after having the *calls* of the bank paid by *B.* until the 24th of *January*, 1804, when the note was reduced to 770 dollars; that the note was, afterwards, raised to 990 dollars, and again renewed, from time to time, and the *calls* paid, until the 24th of *June*, 1805, when it was reduced to 400 dollars. It was then raised to 1,000 dollars, and regularly renewed, and the *calls* paid, from time to time, until the 17th of *October*, 1805, when it was reduced to 900 dollars. It was then raised to 1,300 dollars, and, afterwards, regularly renewed, and the *calls* paid, until the 8th of *Janu-*

ary, 1807, when it was reduced to 670 dollars. It was then raised to 1,000 dollars, and regularly renewed, and the calls paid, until *December* 8, 1807, when it was reduced to 720 dollars; and, in like manner, was, from time to time, renewed, the amount being, at one time, raised, but not above the original sum, and, at another, reduced, until the 8th of *October*, 1811, when, being then reduced to 720 dollars, it was protested for non-payment, the defendant *B.*, having then become insolvent; and the note was taken up by the note of the defendant *L.*, endorsed by the defendant *A.*

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The cause was argued by *Henry*, for the plaintiffs, and *July 2d.*
by *Van Vechten*, and *T. Sedgwick*, for the defendants.

The cause stood over for consideration until this day. *July 19th.*

THE CHANCELLOR. The claims of the three plaintiffs are entirely separate from each other, and rest on distinct grounds.

1. The plaintiff *Wilcox*, claims as a purchaser under the defendant *Bates*, and seeks to be relieved from the operation of a judgment of 1806, against *Bates*, in favour of the defendant *Lansing*. The counsel for the defendant *Lansing*, admitted, at the hearing, that the judgment complained of was satisfied; consequently, the plaintiff *Wilcox*, is entitled to the relief sought by the bill, and to have the defendant *Lansing*, perpetually enjoined from any proceeding upon that judgment. The plaintiff *Brinckerhoff* also seeks the same relief, and is entitled to the same remedy, in respect to that judgment.

Perpetual injunction against any proceeding on a judgment which had been satisfied.

2. The plaintiff *Morey*, claims title to a lot in *Lansingburgh*, under a purchase upon execution against *John Morey*, who held under a lease of the defendant *Bates*, given in 1804, and he seeks to be relieved against the operation of a mortgage covering the same lot, and given by *Bates* to the defendant *Lansing* in 1802.

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The plaintiff *Morey* makes an objection to the mortgage which is peculiar to his case. When the defendant *Bates* leased the lot to *John Morey* in 1804, the defendant *Lansing* was a subscribing witness to the execution of the lease, and with knowledge of its contents. The lease was for only a part of the lands covered by the mortgage then held by *Lansing* against *Bates*, and it was for the term of sixteen years, at the annual rent of 12 dollars and 50 cents.

It is contended, that this fact brings the case within reach of the principle, that if a prior incumbrancer be a witness to a subsequent conveyance or incumbrance, and knowing of its contents, does not disclose the fact of his own incumbrance, but intentionally suffers the party dealing with his debtor to remain in ignorance, he shall have his incumbrance postponed or barred, because he is thereby auxiliary to an act of fraud. (*Hobbs v. Norton*, 1 Vern. 136. *Hunsden v. Cheyney*, 2 Vern. 150. *Mocatta v. Murgatroyd*, 1 P. Wms. 393. *Becket v. Cordley*, 1 Bro. 357.)

The only question here is, whether the doctrine applies to the case.

The mortgage from *Bates* to *Lansing* was, at the time, duly registered; and it is the settled rule of construction under our registry act, that the registry is notice of the mortgage to all subsequent purchasers and mortgagees, and they are chargeable with all the consequences of such notice. (*Johnson v. Stagg*, 2 Johns. Rep. 510. *Frost v. Beekman*, 1 Johns. Ch. Rep. 298. *Parkist v. Alexander*, 1 Johns. Ch. Rep. 389.) The law will, therefore, intend, that *John Morey* had notice of the prior registered mortgage when he took the lease from *Bates*, and that the plaintiff *Morey* had the like notice when he purchased, upon execution, the title of *John Morey*; and it would require direct and satisfactory proof of intentional deception and fraud, on the part of *Lansing*, before he can be postponed to a subsequent purchaser.

If a prior incumbrancer witness a subsequent conveyance or incumbrance, knowing its contents, and does not disclose his own incumbrance, but intentionally suffers the party to remain in ignorance, he shall be postponed, or barred.

But if there is a registry of a mortgage, it is notice to all subsequent purchasers and mortgagees; and there must be proof of intentional fraud to postpone or bar the mortgagee.

The fact, that the lease which he attested, was for a part only of the mortgaged premises, and for a term of years, does not afford a very strong inference of actual fraud, either on the part of *Bates* or *Lansing*. The remaining interest of *Bates* in the lot demised, and the residue of the mortgaged premises, may have been deemed by the parties a sufficient security for the mortgage debt. Intentional fraud upon *John Morey* does not seem to be a necessary conclusion. If no inquiry was made, (and none is charged,) *Lansing* might have presumed, what the law presumed, that his mortgage was well known to *Morey*, the lessee, by means of the registry. He had already made his mortgage known to the world, and if the purchaser did not choose to inquire of him, or to search the records, he had no just ground to complain.

It appears to me to be a fatal objection to this charge of fraud, that the bill itself does not contain any charge, that either *John Morey*, the lessee, or the plaintiff *Morey*, the purchaser under him, were ignorant of the mortgage, at the time of the purchase by them respectively; nor does the bill even charge that *Lansing*, at the time of his attestation, withheld the knowledge of the subsisting mortgage. There is no fraud or intentional deception at the time charged; and if the party sets up a title to relief in equity, on the ground of being a *bona fide* purchaser, he ought to deny notice in the most decided manner. If he will not aver, that he was a purchaser without actual notice, we are not bound to presume it, especially, since the law had given him notice by the registry of the mortgage. Whether he comes for relief in his character of an innocent and injured purchaser, as a plaintiff, or sets up that defence by plea, the rule requiring him to aver his claim fully and explicitly, and which rule has been often declared, (1 *Johns. Ch. Rep.* 302. 3 *Johns. Ch. Rep.* 345. and the cases there cited,) will equally apply. Under the circumstances of this case, a very explicit denial of notice was requisite on the

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And if the subsequent purchaser, or mortgagee, seeks relief on the ground of actual fraud, or intentional deception, on the part of the first incumbrancer, he must clearly and pointedly charge such fraud or intentional concealment in his bill, and an explicit denial of all knowledge of the existence of the prior incumbrance.

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part of the plaintiffs, and a most pointed charge of *intentional* concealment on the part of the defendant *Lansing*, if they meant to clothe themselves in their proper character as purchasers, and to succeed on the ground of actual fraud.

We have a precedent of what such a bill ought to contain, in the case of *Arnott v. Biscoe*, (1 *Ves.* 95. *Bell's Supp.* 67.) The bill there charged, that the party did not disclose the incumbrance, but averred that there was no incumbrance. The suit was to get rid of a purchase on the ground of a concealed incumbrance, and there was a charge of absolute fraud in the defendant.

The mere silence of a mortgagee who witnesses a subsequent purchase, or incumbrance, is not sufficient to affect his right, unless that silence was intentional, and for the purpose of deception; for where the prior incumbrance is registered, there must be actual fraud shown, as false representations, or denial upon inquiry, or artful assurances of good title, or deceptive silence, when information is asked, in order to postpone or bar the prior incumbrancer. And the burden of proving such fraud lies on the subsequent purchaser.

The mere silence of a mortgagee, when he is present at the execution of a subsequent purchase or incumbrance, is not sufficient to affect his right, unless that silence was intentional, and for the purpose of deception. That inference is not to be drawn from silence alone, under the operation of our registry act. There must be active fraud charged and proved, such as false representations, or denial upon inquiry, or artful assurances of good title, or deceptive silence, when information is asked. The burden of the charge, and of the proof, lies upon the purchaser. He must make out the fraud, and the mortgagee is to be presumed innocent, until proved to be guilty. This is the true doctrine to be extracted from the cases, and it applies with accumulated force in cases like this, where the party has put his mortgage upon record, and given notice to the world.

The same objections, as to the charge of fraud, apply to another fact in the bill, viz: That a few days after the date of the lease from *Bates* to *Morey*, a son of the defendant *Lansing* leased the same lot to *Morey*, forever, and this lease was also witnessed by the defendant *Lansing*, with knowledge of its contents.

Why this last lease was taken, is wholly unexplained. But whatever might have been the reasons operating upon the parties to that lease, the simple attestation of it by *Lan-*

ing affords no better inference of a fraudulent design in this, than in the other case.

3. This case, then, turns wholly upon the question, whether the mortgage of 1802, from *Bates* to *Lansing*, was, at the time of filing the bill, to be deemed a valid subsisting mortgage for any part of the debt originally secured by it. In this question the plaintiffs *Brinckerhoff* and *Morey* are equally interested, for they both hold, by purchase under *Bates*, parts of the land covered by *Lansing's* mortgage.

It does not appear to me, that the claim under this mortgage ought to be affected by other transactions totally distinct from it; any fraudulent pretensions of *Lansing*, under either of his judgments, are not to destroy his rights under the mortgage; it must stand and be investigated upon its own merits.

There is no doubt of its having been a fair, valid mortgage in the beginning, and given to indemnify *Lansing*, as endorser of a note drawn by *Bates*, for 1,500 dollars. The only proper inquiry now is, has *Lansing* been injured, and is he entitled to any indemnity for the injury he received by means of that note?

The proviso in the mortgage was, that *Bates* was to pay to *Lansing* 1,500 dollars, with interest, "according to the condition of a certain bond, or writing obligatory, bearing even date therewith, executed by *Bates* to *Lansing*, as a collateral security." The bond here referred to was, according to the condition of it, "to pay 1,500 dollars, with lawful interest, on or before the 7th of *March*, 1803, or keep the defendant *L.* harmless, and pay up the note endorsed by the defendant *L.*, for the defendant *B.*, in the *Farmers' Bank*, when the same should be called for."

The note referred to, in the condition of the bond, was of the same date with the bond and mortgage, and was for 1,500 dollars, payable in fifty-six days, and discounted at the *Farmers' Bank*, in favour of *Bates*. It appears, by the

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A mortgage given to secure a certain sum, according to the condition of a certain bond of the same date, and which bond was conditioned to pay that sum, or indemnify the mortgagee against a note for the same sum, made by the mortgagor, and endorsed by the mortgagee, and discounted at the Bank, for the accommodation of the mortgagor, will continue as a subsisting and valid security, as long as such note shall be run, or be kept alive in the bank, in whole or in part, by renewals thereof, from time to time, according to the customary course of such transactions with the Bank; such mortgage, with a reference to the bond, being sufficient to apprise a subsequent purchaser or mortgagee of the nature of the debt secured.

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testimony of *L. I. Tillman*, that the note was renewed at the end of the fifty-six days, by a new note, made and endorsed in like manner, and so it continued to be renewed, *toties quoties*, for a number of years. The calls were all paid, from time to time, by *Bates*, and the sum was reduced gradually, at times, to 900 dollars, to 700 dollars, to 600 dollars, and, at one time, to 400 dollars, and then it was raised again, on the renewal, to 1,000 dollars, and at one time, to 1,300. The debt of 1802 was kept alive in the bank, by these constant renewals, and alternate variations in the sum, until the 8th of *October*, 1811, when the sum was reduced to 720 dollars, and the note then alive, and for that sum, was protested for non-payment. This catastrophe put a stop, according to the usual mercantile phrase, to the *running of the note in the bank*, and the defendant *Lansing*, as endorser, was obliged to take up and pay the note, which he did, by a note of his own, as drawer, endorsed by the defendant *Adams*.

I see no good reason why the bond and mortgage should not stand as an indemnity and security for the 720 dollars, which *Lansing* was thus obliged to pay.

The bond was intended as an indemnity against the bank debt, originally created by the loan upon the note for 1,500 dollars, so long as that bank debt should continue, under the customary renewals and fluctuations in the amount. The 1,500 dollars were, by the bond, made payable in six months; this fact shows that the parties contemplated a continuation of the debt beyond the fifty-six days, for which the original note was made payable. It was evidence of an expectation that the note was to be repeatedly renewed. The other part of the condition of the bond, that the defendant *Bates* was to pay the note in the bank "when the same should be called for," shows, also, the like expectation. Instead of fixing at the precise period when the first note was made payable, as would have been done in any other case, the parties adopt the loose commercial phrase applicable to

a note running in the bank, and evidently allude to the calls for partial, and for final payment, to be made on the part of the bank. There is no doubt that this construction of the instrument is according to its true meaning; and the mortgage continued a subsisting and valid security so long as the debt created in *September, 1802*, was kept alive in the bank, either in whole or in part, by these customary renewals. The mortgage, with its accompanying bond, fairly disclosed the nature of this continuing security, and no imposition was, or could have been, practised upon any subsequent purchaser or mortgagee, who would be at the pains to examine into the state of the debt disclosed by the bond and mortgage. The mortgage itself disclosed the nature of the debt secured by the bond, when it stated that the bond was taken as a *collateral security*.

Such a security for such a debt might subsist indefinitely; but what concern has the purchaser, or subsequent incumbrancer, with the nature of the security, provided there be no false lights held out, and he be, by the registry, timely and duly informed of the character of the lien?

The only objection of any force to the validity of the mortgage, as a security for these renewed notes, is, that the notes were occasionally *increased*, which might seem to be so far the creation of a new debt. But I apprehend such an occasional increase of the debt, on the periodical renewal, *provided the debt was kept within its original limits*, did not change the character of the debt, or affect the security. It is not so understood in the commercial world, and was not so intended by the parties to the mortgage; and an increase of the sum, on a renewal, was no more than a return of some of the calls made on the former renewals. The identity of the debt remained, so as to preserve the relation between that and the pledge. It would be dangerous and unjust, as between the parties, not to allow the whole note so renewed, to come under the protection of the mortgage. There was nothing here like the *novation* of the civil law.

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There was no new debt created, differing in quality or character, or relation or security. It was according to mercantile and bank usage, (in reference to which the bond and mortgage were given,) a renewal or continuation of the same debt, under the same circumstances, and subject only to those fluctuations in amount, which are customary in such bank operations.

4. But if any part of the debt secured by the mortgage, be still due to *Lansing*, it is then contended, that the plaintiffs are entitled to redeem, and that there ought to be a reference, to ascertain the rateable proportions of such debt to be paid by the plaintiffs *B.* and *M.*, and the defendant *A.*, who may be bound to contribute, according to their respective interests in the mortgaged premises.

The plaintiffs, who are owners of the equity of redemption, are, no doubt, entitled to redeem, but they are not entitled to any delay. A motion to enlarge time for payment upon a bill to redeem, is new, and such a motion was refused by Lord *Eldon*, in *Novosielski v. Wakefield*, (17 Ves. 417.) where he observed, that in a bill to redeem, the plaintiff professes that his money is ready. He comes into Court, saying, "here is the money : give me my estate." If, then, the bill in the present case be viewed as a bill to redeem, the plaintiffs must redeem forthwith. I do not perceive that they are entitled to have the right of the defendant *L.* to proceed upon his pledge *suspended*, until this question of contribution can be settled between the two plaintiffs *B.* and *M.*, and the defendant *A.* It is a question with which he has no concern. It is strictly *res inter alios*. There might be much time consumed, before the ratio and amount of contribution could be settled. It is suggested by the counsel for the defendants, that the defendant *A.* is dead, and the suit, in that case, would have to be revived against his representatives, before the contribution could be ascertained. His proportion of the contribution would, at any rate, be small, for it appears by one of his answers, that he gave

On a bill to redeem, further time of payment is not given.

Nor will the proceedings of the mortgagee, under a power of sale in the mortgage, be suspended or delayed, until the plaintiffs, who are owners of the equity of redemption in different proportions, have settled the rateable proportion which each is to contribute towards the redemption.

only 100 dollars for his interest in the mortgaged premises; and it was only for part of an unexpired term, which is to expire in 1820, or a year hence, and it is averred to be worth no more than the annual rent of 27 dollars, which is charged thereon.

As between the two plaintiffs, *B.* and *A.*, who are not litigants before me, or against each other, it might be difficult to enforce the rate of contribution when ascertained. I am not aware that I could make any decree directly against either of them, in favour of the other, on that point, as the pleadings now stand before me.

There is no case that will warrant such an absolute delay of the rights of the mortgagee, under his mortgage, as is now sought, in order to have this question of contribution previously settled, in which he has no interest. In *Gill v. Lyon*, (1 Johns. Ch. Rep. 447.) to which I have been referred by the plaintiff's counsel, there was no delay of the mortgages. He was merely ordered to sell one part of the mortgaged premises first, and if not sufficient, then to sell the residue, after thirty days notice to the purchasers of such residue, to redeem. So, in *Stevens v. Cooper*, (1 Johns. Ch. Rep. 426.) a mortgagee who had released part of the mortgaged premises, and deprived the owners of the remaining part, of their recourse to the owners of the other part, for contribution, was confined, but not delayed in his remedy, to the rateable proportion of the debt chargeable upon the remaining part. I do not find a case, or a principle in the books, to justify a stay of a mortgagee's remedy, until those who are entitled to redeem have settled among themselves, or by the aid of this Court, their just proportions of the debt. But the plaintiffs may still be entitled to retain the suit, and go on against the defendant *Adams*, or his representatives, to compel a contribution from him, to them, of his proportion (however small) of the mortgage debt. It may be so small, indeed, as not, in any event, to carry costs, or be worth pursuing; but still I am

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content, that the suit continue for that purpose, as against *Adams*.

I shall, therefore, decree: (1.) A perpetual injunction in favour of the plaintiffs, *B.* and *W.*, against any execution or other proceeding, on the judgment confessed by *Bates* to *Lansing*, and docketed on the 3d of *April*, 1806, and that entry of satisfaction of record of that judgment, be made by the defendant *Lansing*.

(2.) That unless the plaintiffs *B.* and *M.*, or one of them, bring into Court and deposit with the register, for the use of the defendant *L.*, within thirty days, the sum of 720 dollars, together with lawful interest thereon, from the 8th day of *October*, 1811, unto the day of bringing in the same, the injunction heretofore issued, in respect to any proceeding under the bond and mortgage in the pleadings mentioned, be thereafter dissolved, so far as to allow the defendant *L.* to demand and collect under it, or by virtue of it, the sum of 720 dollars, with interest from the 8th day of *October*, 1811, until the money shall be paid, and the costs and charges of all necessary proceedings thereon.

(3.) That the bill, as to the defendant *B.*, be dismissed, and that unless the plaintiffs *B.* and *M.* shall, within thirty days, elect to proceed against the defendant *A.*, to enforce his proportion (if any) of contribution to the said debt and interest, so declared due to the defendant *L.*, and give notice of such election to the solicitor for the defendant *Adams*, that then the bill, as to him, shall stand dismissed.

(4.) The question of costs has become somewhat complicated, owing to the distinct claims put forward by the plaintiffs, and the various and unequal merits of the several pretensions.

The plaintiff *W.* is entitled to his costs, as against the defendant *L.*

The plaintiff *B.* and the defendant *L.* are not entitled to costs against each other. The defendant *L.* set up a judgment which was satisfied, and claimed more under the

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as to costs set-
tled.

mortgage than was due. He, therefore, has no right to any costs, though he succeeds in establishing a mortgage debt. The plaintiff *B.* is not entitled to costs against the defendant *L.*; for though he has successfully overthrown the unjust pretensions of the defendant *L.*, under his judgment, he has failed in his charge that the mortgage was satisfied and kept on foot by fraud, a charge which he persevered in making, even down to the hearing of the cause.

The plaintiff *M.* has also failed in his claim, which was, to defeat the mortgage absolutely, as being satisfied, and as being fraudulently set up, but he has so far succeeded as to reduce the mortgage to one half, and less of the amount claimed under it, and, perhaps, neither he nor the defendant *L.*, ought to have costs, as against each other. The case is the same as between the plaintiff *B.* and the defendant *L.*, and the same conclusion ought to follow.

As the defendant *B.*, the original mortgagor, had no interest remaining in the mortgaged premises, but it had all been sold on execution, and purchased in by the plaintiffs *B.* and *M.*, and the defendant *A.*, he had no interest in the controversy, and was not a necessary party. And if he had conducted himself properly, he would have been entitled to his costs of the suit. But he united in his answer with *Lansing*, in setting up the subsisting validity of the judgment, and of the entire mortgage debt. The answer in this respect was not true, and the defendant *B.*, in a further answer, admitted that the judgment debt had been paid. I think he may be considered as having forfeited his title to costs; but, certainly, the plaintiffs cannot claim costs against him, when they show, by their bill, that he had parted with all his interest, and against him no decree could be prayed.

Lastly; If the plaintiffs should not elect to proceed by contribution, and the bill as to the defendant *A.*, should be dismissed, it must be dismissed with costs.

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Decree accordingly.

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In the Matter of JANE N. WOLLSTONECRAFT, an *Infant*.

Where an infant is brought up on *habeas corpus*, the court will inquire whether he is under any illegal restraint, and if he is so restrained, will set him at liberty; but if there is no improper restraint, the court will not, in this summary way, decide upon the right of guardianship, or deliver over the infant to the custody of another.

If the infant is competent to form a judgment, and declare his election, the court will, after examination, allow him to go where he pleases; otherwise, the court will exercise its judgment for him.

July 26th, and
August 3d.

HENRY moved for the allowance of a *habeas corpus* to bring up the body of the Infant, alleged to be detained wrongfully by *Henry Garrison*, of *Philipstown*, in *Putnam* county, or by *Sally Wollstonecraft*, the mother of the said infant, or by *Joseph T. Jackson*, of *Fishkill*, in *Dutchess* county, or by one of them. In support of the motion, he read the following papers :

1. An *affidavit* of *Richard Hall*, of *New-Ipswich*, in the state of *New-Hampshire*, stating, that on the 27th of *May*, 1818, the infant was placed in his family, and under his care, by *Nancy K. Wollstonecraft*, the widow of *Major Charles Wollstonecraft*, late of the city of *New-Orleans*, deceased, father of the infant. That the infant was then in the *twelfth* year of her age, and was placed with him in pursuance of the instructions of *Alfred Hennen*, of *New-Orleans*, a counsellor at law. That the infant was a daughter of *Charles Wollstonecraft*, by *Sally Garrison*, his former wife, and from whom, after the birth of the infant, he was legally divorced, by the competent authority, in *Louisiana*, where they were domiciled, and lived, at the time of the birth of the infant, and until the time of the divorce. That the divorce was on the 28th of *February*, 1811, and *Charles Wollstonecraft* died in *Sep-*

tember, 1817. The divorce was granted at the instance of the said *Charles Wollstonecraft*, for the cause of adultery committed by his wife, *Sally W.*, with one *Harris*, and with divers other persons. That the said *Sally*, since her divorce, and for about two years before, had no intercourse with the said infant. That since the decease of *Charles W.* she has made divers attempts to obtain possession of the infant. That *Charles W.* and *Nancy K. W.* were married in 1812, or 1813, and lived together until his death, and the infant lived with them. That the said *Nancy* had the care of the infant, from the time of her marriage with *Charles W.* until the infant was placed under the care of the deponent. That *Charles W.*, by his will, gave one half of his estate to the infant, and appointed his wife *Nancy* her testamentary guardian, and enjoined her to secure the infant from any intercourse with her mother. That *Nancy K. W.* resigned her trust, as guardian, and procured *Alfred Hennen*, to be appointed guardian, by the competent authority in *Louisiana*. That she brought the infant to *New-Hampshire*, and by virtue of the authority of *Hennen*, placed her under the care of the deponent. That on the 28th of *August*, 1818, *Sally W.*, with the assistance of *Joseph T. Jackson*, forcibly took away the infant, and brought her into this state, and that she is now detained by the said *Joseph*, at his dwelling house, in *Fishkill*, or by the said *Sally*, or her father, *Henry Garrison*, at his dwelling house, in *Putnam* county. That the defendant was the agent of *Alfred Hennen*, the legally appointed guardian, who seeks possession of his ward.

(2.) A letter of *Alfred Hennen*, dated *New-Orleans*, 8th of *May*, 1819, directed to *R. H.* the above deponent, instructing him to apply personally, for the possession of the infant, and sending him 1,000 dollars, of which 600 dollars were to be applied agreeably to the instructions of *Nancy K. Wollstonecraft*, the second widow, and the other 400 dollars, to be applied by him for the expenses of the infant.

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(3.) The instructions of *Alfred Hennen*, dated *New-Orleans*, 28th of *April*, 1818, by which he put his ward, the said *Nancy*, under the charge and protection of the said *Nancy*, and directed her to proceed with the infant to *New-England*, and place her under the care of a clergyman, in some healthy, pleasant, and cheap residence in the interior, near an academy, where she might receive an education; and he thereby invested her with all his authority and control in respect to the infant.

(4.) The proceedings before the Judge of Probates, for the city and parish of *New-Orleans*, on the application of *Mary Kingsbury*, the said *Nancy K. W.*, widow and executrix of *Charles W.* praying that a tutor and sub-tutor to the infant might be appointed, and under which *Alfred Hennen* was appointed tutor to the infant, in *April*, 1818.

Per Curiam. Let the writ issue.

August 2d,
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On this day, *Joseph T. Jackson*, on whom the *habeas corpus* was served, brought up the infant, and returned that the infant was placed in his family, and under his protection, by her mother and guardian, *Sally Wollstonecraft*, and with the approbation of her grandfather, *Henry Garrison*; and it appeared by a document accompanying the return, that *Sally W.* had been appointed guardian of the person and estate of the infant, by the surrogate of the County of *Putnam*, on the 19th of *March* last. The return being read and filed;

THE CHANCELLOR examined the infant touching her situation and wishes; and thereupon observed, that the object of the court was to release the infant from all improper restraint, and not to try, in this summary way, the question of guardianship, or to deliver the infant over to the custody of another. That the course and practice of the courts in these cases was only to deliver the party from illegal re-

straint; and if competent to form and declare an election, then to allow the infant to go where she pleased, and if the infant be too young to form a judgment, then the court is to exercise its judgment for the infant. That in the case of *Rex v. Johnson*, (1 Str. 579. 2 Ld. Raym. 1333. S. C. and 3 Burr. 1436. S. C.) the infant was so young as to have no judgment of her own, and the court delivered the child over to the party suing out the writ; but that case was afterwards overruled in *Rex v. Smith*, (2 Str. 982. 3 P. Wm. 155. note.) The practice sufficiently appeared from the cases of *Rex v. Clarkson*, (1 Str. 444.) *Ex parte Hopkins*, (3 P. Wms. 151.) *Rex v. Delaval*, (3 Burr. 1434. 2 Cox, 242.) *Matter of M'Dowles*, (8 Johns. Rep. 328.) and *Matter of Waldron*, (13 Johns. Rep. 418.)

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The following order was, thereupon, entered :

“The above named *J. N. W.* being brought up before the Chancellor, by *Joseph T. Jackson*, upon a writ of *habeas corpus*, heretofore awarded in this case, and being examined, and appearing to be of the age of thirteen years, or thereabouts, and declaring herself to be of that age, and that she was unwilling to be delivered up to *Richard Hall*, on whose behalf the writ of *habeas corpus* was awarded, and that she wished to remain under the care, and in the custody of, her mother and *Joseph T. Jackson*, who married her aunt, and under whom she was placed by her mother, and she appearing to be of competent judgment to make a choice, Ordered, that she be restored to the custody of *Joseph T. Jackson*, and of her mother *Sally W.*”

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ROGERS against VOSBURGH.

Where the plaintiff has brought a suit at law, and obtained a judgment, and, at the same time, filed his bill against the defendant, in this Court, for the same matter, the Court, on the coming in of the answer, will put him to his election, either to proceed at law, under the judgment, or in the suit brought in this Court; and if he elects to proceed at law, the bill will be dismissed with costs; but if he elects to proceed in this Court, he will be enjoined from taking any step under the judgment, without the leave of this Court.

August 5th.

ON the coming in of the answer, *J. Radcliff*, for the defendant, moved to dissolve the injunction heretofore issued in this cause, restraining the defendant from further intermeddling with the concerns of a periodical publication, entitled, "*The New-York City-Hall Recorder*;" and he also further moved, to restrain the plaintiff from proceeding at law on the judgment entered up in the Supreme Court, mentioned in the pleadings as being taken as liquidated damages, for the same matter now in controversy, and by way of collateral security.

Rogers, in *propria persona*, contra.

The following order, putting the party to his election, was entered :

" ORDERED, that the motion for dissolving the injunction be denied, and that the plaintiff, within eight days after notice of this decretal order, elect whether he will proceed at law under the said judgment, or in this Court, in this suit; and that if he elects to proceed at law, the bill shall thereafter stand dismissed with costs; and if he elects to proceed here, it is then further *ordered*, that he proceed no further

by execution, or otherwise, on the judgment, without the leave of this Court first had and obtained," &c.(a)

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(a) Vide 1 Ves. & Beaum. 382, 3. 7 Taunt. 236. the like rule in such cases.

DE RIEMER and others against CANTILLON and others.

Where, on a sale of land, mills, &c. in the possession of the defendants, under an execution against them, the deed executed by the sheriff to the purchaser, by mistake, did not include the whole premises advertised, and intended to be sold, the sheriff having taken the description from an original title deed, for 72 acres, without averting to the subsequent conveyances of some small parcels contiguous, and of the water lot adjoining the original premises; the defendants, and all parties, at the time, supposing the sheriff's deed included the whole, and the purchaser having bid, and paid a price accordingly: Decreed, that the defendants be perpetually enjoined from prosecuting the ejectment suits brought by them to recover the parcels of land not included in the sheriff's deed to the purchaser, and that they execute to the purchaser a release of all their right and title to the same.

Where a judgment at law, by confession on a warrant of attorney, appears regular and formal, according to the record, this Court will not interfere with, or impeach it, on the ground of any alleged irregularity, or informality in entering it up; but will consider the rights acquired under such judgment, as valid in law; especially, where several years have elapsed since the judgment, and the defendants have acquiesced in it, and in the execution and sale under it.

THE bill stated, among other things, that *Richard De Cantillon*, in his life time, owned seventy-two acres of land on the *Hudson* river, which, in his title deed, was described as beginning at a hemlock tree, on the bank of *Crom Elbow Creek*, and described by metes and bounds, and running to the *Hudson*, and along the river to the creek, and then as

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the creek runs, including the creek, to the place of beginning. *De Cantillon* built mills on the creek, and on the land; and he, jointly with *J. T. Stoutenbergh*, purchased several small pieces of land adjoining, on the north side of the creek, for the purpose of making dams, from *S. Bard*, the deeds for which were dated in *June* and *September*, 1790; and on the 6th of *December*, 1793, *S.* released all his right to *De Cantillon*, who, afterward, obtained a patent for five acres of land covered with water, in the *Hudson*, ~~again~~ his seventy-two acres, for the purpose of making a wharf and landing place. *De Cantillon* died in *February*, 1806, seized of all these parcels of land, &c. and his right and title descended to his four children, two sons, and two daughters, who were defendants. In 1809, several judgments were obtained against the children, the second of which was in favour of *James Roosevelt*, for 7,000 dollars, against three of the children, who, also, executed a mortgage on their undivided three fourths to *R.* Another judgment was in favour of *Clapp Raymond*, on the 28th of *October*, 1809, against the same children, on which a *fi. fa.* was issued in *October*, 1809, by virtue of which the sheriff seized all the said lands owned by *R. De Cantillon*, at his decease, and sold the same, at auction, to *John Parkinson*, for 350 dollars, subject to all the incumbrances, most, or all of which; then remained wholly unpaid, particularly the judgment in favour of *R.* On the 26th of *February*, 1811, the sheriff executed a deed to *P.* for the 72 acres of land, and, as the bill alleged, by *mistake*, reference was had to the original deed for the seventy-two acres, without including the contiguous pieces of land purchased of *Bard*, or the land under the water of the *Hudson*, all of which were, at the time of the sale by the sheriff, and at the time of his executing the deed to *P.*, in the possession of the four defendants named in the execution, without being distinguished, or separated by enclosure, from the tract of seventy-two acres. *P.*, in 1810, recovered a judgment against the

four children of *C.*, for a large sum of money, and in *June*, 1811, took an assignment from *R.*, of the mortgage and judgment. *Catharine*, one of the daughters, and her husband, *Collins*, in *December*, 1810, executed a conveyance to *P.* for an undivided fourth of the seventy-two acres; and on the 1st of *May*, 1811, the sons, and the daughter, and *Collins*, gave up the possession of all the lands above mentioned, and the wharf, landing, &c. except two houses, which they retained, with consent of *P.* It was, afterwards, ascertained, that all the incumbrances amounted to fifteen thousand dollars, and *P.* told the four defendants, that if he could sell all the property for that sum, he would not enforce the judgments, &c. against this, and other property of the defendants. *Peter De Riemer*, since deceased, at the request of the four defendants, purchased of *P.* these parcels of land, so in possession of the four defendants and *P.*, which he examined, in company with the defendants, and took a deed from *P.*, dated the 1st of *May*, 1812, describing the seventy-two acres, as in the deed of the sheriff, without including the pieces bought of *Bard*, and the land under the water of the *Hudson*. During all this time, *Parkinson*, the sheriff, and *De Riemer*, understood and believed, that the sheriff's deed included all the lands so possessed by those defendants, and both *P.* and *De Riemer* paid a price accordingly; and the bill charged, that the four defendants, who were present, and assented to the purchase by *D.*, fraudulently concealed from him and *P.*, until *May*, 1813, that the boundaries in the sheriff's deed to *P.*, and in the deed of *P.* to *D.*, did not include the lands purchased of *Bard*, or the land covered by water. *De Riemer*, after the purchase of *P.*, suffered *R.*, a plaintiff, to occupy the store and wharf, &c. and others to occupy the grist mill, &c. In *May*, 1814, the defendants brought an action of ejectment against *L.*, for the wharf, &c. and another ejectment against the occupiers of the mill, &c., on the ground, that no title passed by the deeds abovementioned, for the

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the land purchased of *Bard*, or the land covered with water; and also, on the ground, that the judgment in favour of *Clapp Raymond* was void, having been entered on a warrant of attorney, in vacation, in the Court of Common Pleas of *D.*, and no rule for judgment entered on the records of the Court. In the actions of ejectment, verdicts were taken for the plaintiff, subject to the opinion of the Supreme Court, on a case made, but which had not been argued. The suit against *L.* had been stayed by an injunction. The mills and water lot were the principal objects of *De Riemer* in making the purchase. Prayer for an injunction from proceeding in the ejectment suits, and that the defendants may be decreed to execute a release to the plaintiffs of the lands not included in the deed to *P.*

Peter De Riemer died October 2d, 1814, possessed of the seventy-two acres of land, &c. and by his will, devised the use of his estate, real and personal, to his wife, for life, and directed all his estate, real and personal, to be sold by his executors, and the proceeds to be divided among his children. The bill was filed by the widow and children of *Peter De Riemer*, deceased, plaintiffs, against the children of *De Cantillon*, and *J. S. Stoutenburgh*.

The material parts of the answer, and of the evidence, are sufficiently stated in the opinion delivered by the Court.

P. Ruggles, for the plaintiffs.

J. Tallmadge, for the defendants.

THE CHANCELLOR. The proof in this case is full and complete, that the deed from the sheriff to *Parkinson* did not convey all the land that was sold and bid off at the sheriff's sale. Considering the situation and possession of the parcels of land not included in the sheriff's deed, it is difficult to believe, that they would have been *intentionally* omitted in the sale. They are parcels of land appurtenant

+ after his death

to the seventy-two acres, and were purchased by the ancestor of the defendants, as proper and necessary for the enjoyment of the landing, and to give due value to the privileges attached to the farm. No reasonable man could ever have thought of separating the land fronting *Hudson's* river from the water lot, because the latter would be useless without the former, and it is essential to the value of the former as a landing place. Nor would any reasonable man think of separating the mills on the creek from the small parcels of land on the north side of it, which are required for the construction, support, and use of dams on the creek, and are of little value for any other purpose. We accordingly find, that the defendants, prior to the sheriff's sale, had enjoyed the water lot, and the small pieces of land north of *Crom Elbow* creek, as part and parcel of the farm, without any visible distinction or separation, by fence or otherwise. And when the sheriff advertised the farm for sale by execution, he stated, that he should sell the seventy-two acres, "with the mills, landing, &c. in possession of the defendants." The witnesses present at the sale concur in the fact, that not only the seventy-two acres, but the wharf, store, mills, and privileges belonging thereto, were put up by the sheriff, and actually struck off to *Parkinson*.

The cause of the mistake in the deed is easily seen, from the fact, that the deed was drawn, as to description and boundaries, from the original deed to *Richard De Cantillon*, deceased, of the seventy-two acres, without having recourse to the subsequent conveyances of the water lot, and the parcels north of the creek. But all the parties understood, that all the rights and privileges, and land appurtenant to the seventy-two acres, had actually passed, and the defendants, at once, surrendered up possession of the whole to *Parkinson*, the purchaser. No separation was thought of, at the time, by any of the parties in interest.

It is clear, that *P.* intended to buy, and thought he had purchased the land now in dispute. He bought subject to

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all existing incumbrances, which then amounted to 15,000 dollars, so that he gave near 16,000 dollars for the land, including another farm of 200 acres, which he bought at the same time. Admitting the other farm to be worth 8,000 dollars, which the defendants allege to have been the value at the time, and admitting the seventy-two acres, exclusive of the water lot, and the *Bard* lots, to have been worth 50 dollars an acre, (and all the witnesses agree that they were not worth more,) then *P.* gave upwards of 4,000 dollars more than the real worth of the land at the time, if he did not buy the land now in question. This fact is decisive proof of his intention. Besides, *P.* took possession of the whole, with the assent and approbation of the defendants, and he used and occupied it as owner, with the like knowledge and assent. This appears from his advertisement in the public prints, offering the landing for sale, containing seventy-two acres, with mills, a dock, store houses, &c. It appears, also, from the fact, that he repaired the wharf, and with the knowledge and assistance of one of the defendants.

Neither *P.*, nor the defendants, were aware of the mistake in the sheriff's deed, until after the purchase by *De Riemer*. It is in proof, that *De Riemer* intended to buy the whole land, including what is now the subject of controversy, that he previously examined the store and wharf, and mills, and declared that they were the principal inducement to his purchase, and constituted its chief value. One of the defendants accompanied him in his examination, and he gave the consideration of 15,000 dollars. After he had taken his deed, which was copied, as to boundaries and description, from the sheriff's deed, (for the same mistake in description was continued,) he took possession of the whole entire premises, as *P.* and as the defendants before him had possessed them. He leased the store and mill, and had the land surveyed, and one of the defendants attended the survey, and pointed out the slip of

land lying north of the creek, which had been leased of *Samuel Bard*, as the correct northern boundary.

In short, it is evident from the testimony of the witnesses, and from the answer of the defendants, that the defendants, equally with the sheriff and *P.*, in the first instance, and with *P.* and *De Riemer*, afterwards, were under the mistaken impression and belief, that all the lands adjoining to the seventy-two acres, as part and parcel thereof, had been duly conveyed and possessed, according to the original sale by the sheriff; and the mistake in the deeds was not discovered by either of them, until after *De Riemer's* purchase in 1802.

Can it be possible, that such an obvious and injurious mistake as this ought not to be corrected? The correction is required by the most obvious justice. The defendants, who acquiesced in the purchase as it was originally intended, and gave up possession accordingly, and who suffered *P.* to occupy and improve, and *De Riemer* to buy and occupy, under the belief that they were the lawful owners of the entire premises, ought, in justice and conscience, to be estopped from availing themselves of that mistake.

The sale and purchase, as I have already observed, was of the entire possession of the defendants, and the mistake in the sheriff's deed was in the description of the boundaries. The defendants were not, strictly, parties to that sale and conveyance, but they were the defendants in the execution under which the sale was made, and in possession of the land; they were present at the sale and delivery, and assisted in carrying the contract into effect according to its true intent and meaning; and if it be just, that the mistake in the deed be corrected, the defendants are particularly bound, in equity and good conscience, to abstain from availing themselves of that mistake, to the prejudice of the plaintiffs. They ought to release, and abandon their claim. More especially ought they to do this, in respect to the plaintiffs,

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since they saw *Peter De Riemer* give the consideration of 15,000 dollars, for land not worth 4,000 dollars, if the water lot, and the strip of land north of the creek, be excluded, and since they made no claim, at that time, to that part of the premises, and even encouraged him in the purchase.

Under all the circumstances, the prayer of the bill that the defendants be enjoined from the prosecution of their suits at law, and be decreed to release their claim at law to the plaintiffs, is most reasonable, and founded on clear and established principles of equity.

But, the defendants allege, that the judgment in favour of *Clapp Raymond*, under which the sheriff sold to *P.*, was entered up, in the *Dutchess* Court of Common Pleas, on a confession of judgment, taken out of Court, and which, by the statute, as it then stood, was declared to be void. This is the averment in the answer; but the defendants have not furnished any proof of the fact, and assuming it to be true, the question is, whether that objection can be raised here, and in this case? It is to be inferred, from the answer, that the record of the judgment appears to be regular, and to have been rendered as of *October* term of the *Dutchess* Court of Common Pleas. Whether a rule for judgment was moved and entered in term time, is a matter of fact, and the answer denying the existence of any such rule, is not accompanied with proof. The judgment was confessed, and entered in *October*, 1807, and it does not appear to have been set aside as irregular, or reversed as erroneous. It remains in full force to this day, according to the record. It cannot now be set aside for irregularity, even in the Court of Common Pleas, and this Court has nothing to do with that question. (*Shottenkirk v. Wheeler*, 3 *Johns. Ch. Rep.* 275.) Though the statute, in force in 1809, declared, that judgments in the Courts of Common Pleas, entered by confession in vacation, should be void, it is not to be supposed, that the legislature intended, that acts done under such judgments were in no case, and at no time, and under no

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possible circumstances, to be regarded as valid. The rights claimed under such judgments are susceptible of confirmation by acquiescence, and time, and the waiver of the irregularity. In the present case, the judgment and the execution and sale under it, have been acquiesced in by the defendants, and recognized by them as valid, until they are barred from application to the Court of Common Pleas, to set aside the judgment as irregular, and until a *bona fide* purchaser for a valuable consideration, and without notice, has been led to purchase under a title derived from that judgment, and with the knowledge, approbation, and encouragement of the defendants, or some of them.

This Court cannot, under such circumstances, question a judgment which stands regular and formal upon the records of the Court. It is bound to regard the rights acquired under it, as legally acquired; the invalidity of that judgment is a point falling within the cognizance of a Court of law, and not of this Court.

I shall, accordingly, decree, that the defendants be perpetually enjoined from further prosecuting the ejectment suits in the pleadings mentioned; and that, within forty days after due notice of this decree, they execute and deliver to the plaintiffs a release of all their right and title to the tracts of land in controversy; and that, if the parties cannot agree as to the form and execution of the release, the same be approved of by one of the masters of this Court, and be drawn and prepared at the expense of the defendants, and that neither party have costs of this suit as against the other.

I have adopted this course as to costs, because the same course was adopted by Lord *Hardwicke*, in *Stiles v. Cooper*, 3 *Atk.* 692.) where the heir, as remainder-man had lain by, and suffered an assignee of a lease to rebuild, and had received the rent, and then brought an ejectment for defect of legal title in the assignee. The Lord Chancellor, by injunction, quieted the assignee in his possession, but de-

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clared that no costs were to be paid on either side. The same rule was followed in the similar case of *Jackson v. Cator*, (5 *Vesey*, 685.) where a landlord, by his conduct, amounting to acquiescence and consent, was restrained from exercising his legal right.

Decree accordingly.

J. R. LIVINGSTON *against* GIBBONS AND OGDEN.

The name of a defendant cannot be struck out of a bill, on motion of a co-defendant, without his consent, or notice of the application.

Where one of two defendants is a citizen of another state, and there is no joint trust, interest, duty, or concern, in the subject matter of controversy, he may be allowed to appear and defend alone, so as to enable him to remove the cause into the Circuit Court of the *United States*.

If a defendant intends to remove a cause into the Circuit Court of the *United States*, he must file his petition, &c. for that purpose, at the time of entering his appearance in this Court.

Where a defendant files his answer to an injunction bill, and is heard by his counsel, on the merits of the bill and answer, and the court makes a decretal order in the cause, it is too late to apply for the removal of the cause to the Court of the *United States*.

The usual mode of appearing in this Court, is by entering an appearance with one of the *clerks* of Court. But a notice by the defendant's solicitor of an appearance, given to the plaintiff's solicitor, without an entry in the clerk's minutes, would, *it seems*, be binding on the party.

An appearance filed with the *Register*, is an appearance on the *records of the Court*. And where a defendant puts in an answer, which is read in Court, by consent of the opposite counsel, and ordered to be filed with the *register*, and a decretal order is made thereon, in favour of the defendant, it is an *appearance on the records of the Court*: and it is too late, afterwards, to petition for the removal of the cause.

August 14th.

HENRY, for the defendant *Gibbons*, moved for an order that the name of *Aaron Ogden* be struck out of this cause,

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as a party defendant, or that the defendant *Gibbons* be permitted to defend this suit alone, in the same manner, in all respects, as if the bill had been filed against him alone.

He, at the same time, presented a petition of the defendant *G.*, with an affidavit thereto annexed, stating that he is a citizen of the state of *New-Jersey*, and resides therein, and that the plaintiff is a citizen of the state of *New-York*, and resides therein. That the plaintiff, shortly before the 3d day of *May* last, filed his bill in this suit, praying for an injunction, as in the bill stated; and that on the 3d of *May* a motion was made for an injunction, according to the prayer of the bill. That the motion, as to the defendant *Ogden*, was denied, and as to the defendant *G.* it was denied, so far as respected the navigation of the waters of the sound between *Elizabethtown Point* and *Amboy*, in the state of *New-Jersey*, and it was granted only so far as to restrain the defendant *G.* from navigating with vessels propelled by steam, the bay of *New-York*, &c. That the defendant is owner of the steam boat, called the *Bellona*, and is desirous of employing her in the coasting trade, for which she is licensed. That she is duly enrolled at the port of *Perth Amboy*, in *New-Jersey*. That the petitioner is sole owner of the boat, and has no interest or concern on the subject, with the other defendant *O.* That the matter in dispute in the said cause exceeds 500 dollars. That being desirous of removing the above cause into the Circuit Court of the *United States*, he offers sufficient security for entering the cause and his appearance, in the said Court, on the first day of its next session.

H. Bleecker, for the plaintiff, opposed the motion and petition: 1. Because, here was a suit against two defendants, and one of them was no party to the petition. 2. Because, the defendant *G.* had already appeared, in fact, and made a defence, and this Court had passed upon his rights in this cause, on the third day of *May* last.*

* *Vide*, ante
p. 48.

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Henry, in reply, referred to 1 *Caines' Rep.* 248., and *Coleman's Cases*, 58., to show that an application for this purpose is in time, though bail may have been excepted to : to 4 *Johns. Rep.* 493, to show that after judgment against the casual ejector, the landlord is in time ; and to *Newland's Ch. Pr.* 35. to show that an appearance in chancery is entered with the clerk.

He insisted that the defendant *G.* had never entered his appearance with one of the clerks, and that the paper on file, purporting to be his answer, had been used merely as an affidavit.

THE CHANCELLOR. The name of the defendant *Ogden* cannot be struck out of the bill, for he is no party to the present application, and has not had notice of it. It appears from one of the documents accompanying the petition, that the petitioner *Gibbons*, on the 24th ult. addressed a letter to the defendant *Ogden*, praying to know whether the suit as against *Ogden*, was still subsisting ; that if it was still in a course of defence, he would unite in an application to have the cause removed into the court of the *United States*, and that if *Ogden* neglected or refused to join for that purpose, *Gibbons* would apply to have *Ogden's* name struck out of the bill. All the answer given to the application was, that *Ogden* would not concur in, or authorize any measure to remove the cause, and no notice of the present application has been since given.

The defendant *Gibbons* is entitled to that part of the motion which asks that he may defend alone. He has no joint concern or interest with his co-defendant, and he is then, as of course, allowed to demur, plead, or answer separately ; and I see no good reason why he may not, also, make the present application for himself. If the motion should be granted, the suit, as against *Gibbons*, would become entirely separate and distinct, and so, perhaps, it ought to be, if there be no joint trust, or interest, or duty,

or concern in the subject matter of the suit. It ought not to be in the power of a plaintiff to deprive a citizen of another state of his right and privilege to remove the cause, by merely joining with him another defendant who cannot, or who will not, unite in the application.

2. The only serious question on this motion, is whether the defendant *G.* has made his application in due time.

The act of Congress declares, "That if a suit be commenced in any State Court, by a citizen of the state in which the suit is brought, against a citizen of another state, and the matter in dispute exceeds 500 dollars, &c., and the defendant shall, *at the time of entering his appearance in such State Court*, file a petition for the removal of the cause, for trial, &c. and offer good and sufficient surety for his appearance, &c. in such Court, (of the *United States*,) it shall then be the duty of the State Court to accept the surety, and proceed no further in the cause." (1st Cong. sess. 1. c. 20. s. 12.)

The question resolves itself into this point, whether the defendant *G.*, previously to the time of filing this petition, entered his appearance in this Court, within the meaning of the law, so as to be now precluded from the benefit of his petition?

The following facts appear from the records of this Court, and from the papers on file in the register's office.

On the 3d day of *May* last, a motion was made for an injunction, according to the prayer of the bill. Due notice of the motion, together with a copy of the bill, had been previously served upon each of the defendants, *G.* and *O.* The defendant *Ogden* appeared in proper person, and the defendant *Gibbons* by his counsel, *Mr. Scudder*, and opposed the motion, and each of them produced their separate answers to the bill, drawn up in due form, and sworn to, and subscribed by counsel. The reading of those answers was objected to, as the solicitor of the plaintiff had not received notice of them, and they had not been regularly

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filed, and the plaintiff was likewise entitled to three weeks, to look into the answers, and to take exceptions to them, if they should appear to be insufficient. They were, therefore, not entitled to be treated as *answers*, but were permitted to be read, and were read and used as *affidavits* of the defendants going to the merits of the bill. The answer (for so it may be called) of the defendant G. met the substance of the bill, and brought the merits of the claim to an exclusive privilege set up by the plaintiff, into full and fair discussion. It offered to maintain and prove all the matters and things contained in the answer, "as this honourable Court should direct," and concluded with praying that he might be dismissed with costs. This answer was regularly sworn to by the defendant G., as his answer, and was subscribed by G. Griffin, as his solicitor and counsel, and was used and filed, as his defence upon the motion. The case was discussed and considered upon the merits of the bill, and of those answers, and on the same 3d day of May, a decretal order was entered, with the knowledge of all the parties.

Do not these proceedings, on the part of the defendant G., amount to an election of his tribunal, and a submission to the jurisdiction of this Court? He thought proper to discuss here the merits of the claim, and of his defence, which arose under the motion for an injunction, and he has had the benefit of an opinion of this Court in his favour, on one essential part of the claim. It is evident, also, that he intended to submit his defence to the cognizance of this Court; and the answer which he produced and read, and which is now on file, was intended by him as his appearance and answer to the suit. The act of Congress requires the petition for removal to be coeval, in point of time, with the party's *appearance in Court*, and the defendant is not to be allowed to appear and submit to the consideration of the State Court the merits of the case, either in whole or in part, and after having procured a decision, to apply for a removal of his cause. He is not entitled, under that act,

to an opinion of both the State and the Federal Courts, upon any part of the case, unless in the regular course of appeal or by writ of error. It appears to me, that the defendant is jointly barred, by his appearance and defence, on the 3d of May last, from the benefit of his petition, and that he is now out of time with this motion.

But it is urged, that the defendant *G.* has not entered his appearance in the ordinary and formal manner required by the practice of the Court.

The usual mode of a voluntary appearance in this Court, is by entering an appearance with one of the clerks, (and the defendant applies for that purpose by himself, or his solicitor,) and the clerk, or solicitor, gives notice to the plaintiff's solicitor that the appearance is entered. This appearance is nothing more than an entry in the clerk's minutes that the defendant has appeared; there is nothing so solemn and material in this manner of appearance, but that it may very easily be waived; and, probably, the defendant would be bound by a notice of appearance given by his solicitor to the opposite solicitor: if an entry of such appearance should become material, the Court would compel the solicitor to have it made.

There is, also, an appearance with the register, and such an appearance, say the books, "is an appearance upon the records of the Court, and differs from an appearance in the office, by a clerk in Court." (*Hinde's Prac.* 144. 1 *Harr. Prac.* §19.) It may be done when the defendant is not in contempt.

In the present case, the defendant *G.* may be considered as having appeared upon the records of the Court. He comes into Court, by his counsel, with an answer duly signed by his solicitor and counsel; that answer is permitted to be read in the presence, and by the consent of, the opposite party, and it is directed to be filed with the register, and is made the foundation of a decretal order of the

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Court in favour of the defendant. His appearance is recognized by that decretal order.

I am of opinion, that this amounted to a valid appearance with the register, and, consequently, that the defendant *G.* ought to have presented, at that time, his petition for the removal of the cause; and that, according to the act of Congress, and the reason and equity of the case, in reference to that provision, the motion on the part of the defendant *Gibbons* ought to be denied.

Order accordingly.

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In the Matter of *S. F. Bostwick.*

Under what circumstances, and in what manner, and to what extent, the *principal* of a sum devised to children, after the death of their mother, to whom the *interest* was payable during life, will be broke in upon, and directed to be paid, by the executors, for their present maintenance and education, being infants, and, also, for the discharge of debts contracted by the mother, for their *past* maintenance.

August 16th. PETITION of *Susannah F. Bostwick*, stating, that her father, *Joseph Watkins*, now deceased, by his will, directed his estate, real and personal, to be appraised, and that his executors should put at interest, on good security, one *eighteenth* part thereof, and pay the interest of such part to the petitioner, during her life, in half yearly payments; and he then devised the principal, after her death, to her heirs. That the testator appointed her two brothers, *Joseph S.* and *John S. Watkins*, executors, who have qualified. That the estate being appraised, as directed, amounted to 66,293 dollars, 85 cents; and that the share of the petitioner amounted

to 3,662 dollars, 99 cents. That her father left her no other provision by the will, but a pecuniary legacy of 250 dollars, which she had received and expended, and the one fifth of a house and lot in *Spring-street*, after the death of her mother, who is fifty-six years old, which lot is held upon a lease for years, of which forty-four years are to come. That the property above mentioned is all she possesses, except a small house on a lease, valued at 250 dollars, and the only means she has to support herself and six children, four sons and two daughters, all infants, the youngest of whom being under seven years. That her husband has abandoned his children, and by a decree of this court, of the 23d of *January*, 1818, the petitioner, as plaintiff, was separated forever from the bed and board of her husband, and the custody of the children was committed to her; and her husband was prohibited from intermeddling with the estate to which she was entitled under her father's will, or which she might otherwise acquire. That her children have no property but what is given to them as principal, by her father's will. That the testator died the 7th of *May*, 1817. That she is now in debt 682 dollars and 82 cents, for the necessary maintenance of herself and children, whom she is unable to support for less than 811 dollars per annum. *Prayer*, that part of the principal which, after her death, will go to her children, may now be applied towards their maintenance; and that the executors may pay her the debt of 682 dollars, 82 cents, already accrued, and an annual allowance out of the principal, which, with the interest, may be sufficient to maintain and educate the children.

This petition was supported by affidavit, and by schedules referred to, showing how the debt of 682 dollars arose, to whom due, and the necessary items comprising the sum requisite for the future maintenance. Due notice of the time and place of presenting the petition, with a copy of it, was served upon the executors.

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*R. Riber*, for the petitioner, cited *ex parte Whitfield*, 2 *Ask.* 315.; *ex parte Kent*, 3 *Bro.* 88.; *ex parte Salter*, 3 *Bro.* 500.; Sir *Th. Plumer*, in *Stretch v. Wulkins*, 1 *Mad. Ch. Rep.* 257., to show that maintenance may be allowed for an infant, upon petition, and without bill, and though there be no cause in court.

Maintenance allowed for infants, out of the capital of their estate, upon petition, without bill.

**THE CHANCELLOR.** The practice seems sufficiently settled by the authorities referred to, and by that of *ex parte Mountfort*. (15 *Ves.* 445.) to allow of the application for maintenance, by petition. The history of the cases where relief of this kind has been afforded upon petition, without bill, is given in the case *ex parte Salter*, (3 *Bro.* 500;) and in that case the costs of the petition were allowed to the guardian in his accounts, according to the precedent in *ex parte Thomas*, (*Amb.* 196.)

The greatest difficulty in this case is the application to break in upon the capital of the infants' estate, for their maintenance and education. The legacy of one eighteenth of the testator's estate. (and which amounted to 3,682 dollars, 99 cents,) was "to be put at interest, by the executors, upon real security, at six or seven per cent. per annum; and the interest of that sum was to be paid half yearly to the petitioner, during her natural life; and after her decease, the moneys so put at interest for her use were given and bequeathed to her lawful heirs, equally to be divided between them." We must impair the principal sum, or no relief can be afforded to the infants. This case affords peculiar and strong claims to such an interference. The petitioner calls for it, though she thereby diminishes her own income. The capital is small when divided among the six children; and we may well adopt the remarks of Lord Keeper *North*, in *Barlow v. Grant*, (1 *Vern.* 255.) that it was "fit and reasonable that part of the principal of a child's legacy of 100*l.* should be allowed for his education. The money laid out in the child's education was most advantageous



and beneficial for the infant, and, therefore, he should make no scruple of breaking into the principal, where so small a sum was devised, that the interest thereof would not suffice to give the legatee a competent maintenance and education. But in case of a legacy of 1000*l.* or the like, there it might be reasonable to restrain the maintenance to the interest of the money." So, also, in *Harvey v. Harvey*, (2 *P. Wms.* 21.) the same practice was pursued, and the Master of the Rolls declared, that where a legacy was given to an infant, payable at twenty-one, without any devise over, and the infant has nothing else to subsist on, the court "will order part of this legacy, in order to provide bread for the infant, to be paid presently, allowing interest for the same, to the person paying it, out of the remaining principal."

But notwithstanding the doctrine of these cases, the Master of the Rolls, in the modern case of *Walker v. Weatherell*, (6 *Ves.* 473.) would not only not allow trustees, of their own authority, to impair the capital of the infant's estate, but said, that it had very rarely occurred, that the Court itself had broken in upon the capital, for the mere purpose of maintenance, though it frequently had done it for the purpose of advancement, or setting up the child in life. "As to mere maintenance," he said, "I doubt it, even upon a petition presented. It is a great misfortune, if the capital is so small as not to leave a comfortable maintenance and education; but what can the Court do?" The answer to be given to these doubts of the Master of the Rolls, is, that an allowance of this kind is within the powers, and under the discretion, of the Court, and may, in many cases, be as fitly and properly made for maintenance and education, as for an advancement. It may be much more so; for an advancement might not be of much use to a child that had been brought up in poverty and ignorance. The capital coming to each child, in this case, at the uncertain, and probably distant, period of its mother's death, would not much

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If the sum devised be small, the principal may be applied; otherwise, the interest only.

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exceed 600 dollars, and the necessity of immediate relief to the petitioner, for and on behalf of her children, is palpable and pressing. The doctrine of Lord Keeper *North* is reasonable, and applicable to the case, and I am disposed, in this instance, to follow it. The cases of *Cavendish v. Mercer*, and of *Greenwell v. Greenwell*, (5 *Ves.* 194 and 195, *note*,) are strongly in favour of such an allowance, and they rested on the same principle. There were bequests, in those cases, to grandchildren, payable at twenty-one, and *the interest to accumulate and be paid with the capital*; yet, the necessity of the cases requiring it, a maintenance was ordered out of the fund, taking the consent of the persons entitled over, in the event of the childrens' death. This was done from the reason and necessity of the case, though Lord *Rosslyn* observed, in one of those cases, "I fear, if I should make the decree, it would be my will, and not the testator's."

A parent may be allowed out of the infant's estate for *past* maintenance.

The petitioner, also, asks for reimbursement for the past maintenance of her children, or for the discharge of debts which she has of necessity incurred for that purpose. Such an allowance is, also, within the rules and practice of the Court. Lord *Thurlow*, in *Hill v. Chapman*, (2 *Bro.* 231.) and *Andrews v. Partington*, (3 *Bro.* 60.) held, that no allowance could be made to a parent for the past maintenance of an infant. But, afterwards, in *Reeves v. Bryman*, (6 *Ves.* 425.) and in *Sherwood v. Smith*, (6 *Ves.* 454.) Lord *Eldon* approved of the alteration in this old practice, by Lord *Rosslyn*, and he allowed a father to be reimbursed for the past maintenance of a child. Lord *Thurlow* was said to have changed his first opinion on this point; and Lord *Alvanley* frequently made a retrospective allowance for maintenance, and the practice afterwards grew familiar. (*Sisson v. Shaw*, 9 *Ves.* 285. *Chambers v. Goldwin*, 11 *Ves.* 1. *Maberly v. Turton*, 14 *Ves.* 499.) The old rule, as it was first laid down by Lord *Thurlow*, would lead to great inconvenience, for though the wants of the infant

might be ever so pressing, he could not receive any maintenance (charity excepted) without the expense of a suit, and reference to a Master

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There must be a reference in this case. I might, indeed, say with Lord Rosslyn, in *Greenwell v. Greenwell*, "that I think myself sufficiently warranted to order a suitable allowance for maintenance, without a reference," yet the extent of that allowance, and the disposition of the fund, so as to meet it, and the other means of support (if any) of the petitioner, and the items of her charge for past maintenance, are proper subjects of reference.

I shall, therefore, order and direct, that the executors pay to the petitioner, within twenty days after service of notice of this order, two hundred dollars out of the fund set apart for her and her children, towards the maintenance and education of her children, and for which the executors shall have the requisite allowance in their accounts; and that it be referred to a Master to inquire and report what yearly sum, under all the circumstances of this case, would be a proper allowance for the petitioner and her children, and what disposition ought to be made of the fund, so as to meet it, and also to examine and report on the justness and truth of the charges for past maintenance, &c.

Order accordingly.

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In the Matter of DANIEL WASHBURN.

It is the law and usage of nations to deliver up offenders charged with felony and other high crimes, and who have fled from the country in which the crimes were committed, into a foreign and friendly jurisdiction.

And it is the duty of the civil magistrate to commit such fugitive from justice, to the end, that a reasonable time may be afforded for the government here to deliver him up, or for the foreign government to make application to the proper authorities here for his surrender. But if no such application is made in a reasonable time, the prisoner will be entitled to his discharge.

The evidence to detain such fugitive from justice, for the purpose of surrendering him to his government, must be such as would be sufficient to commit the party for trial, if the crime had been perpetrated here.

The 27th article of the treaty of 1795, between the *United States* and *Great Britain*, was merely declaratory of the law of nations on this subject; and since the expiration of that treaty, the principles of the general law of nations remain obligatory on the two nations.

Therefore, the Chancellor, or a Judge, in vacation, has jurisdiction to examine a prisoner before him on *habeas corpus*, and who has been taken in custody on a charge of *theft*, or *felony*, committed in *Canada*, or a foreign state, from which he has fled; and if sufficient evidence appears against him to remand him, or if there is not sufficient proof to justify his detention, to discharge him.

August 21st.

*D. WASHBURN* was brought before the Chancellor upon *habeas corpus*, allowed and directed to the sheriff of *Rensselaer* county. It appeared by the return, that he was detained in custody by virtue of a *mittimus* from the recorder of *Troy*, under a charge of having in his possession 170 bills of the bank of *Montreal*, of the denomination and value of five dollars each, which had been feloniously taken from some person unknown, and that he had received and secreted the bills, knowing them to be so stolen.

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THE CHANCELLOR, in pursuance of the act, entitled, "an act to amend the act, entitled, an act to prevent unjust imprisonment, by securing the benefit of the writ of *habeas corpus*," (sess. 41. c. 277., which provides, "that in all cases of imprisonment, whether upon commitment of any criminal, or supposed criminal matter, or not, the Chancellor, Judge, or other officer, before whom any person may be brought on *habeas corpus*, in vacation time, shall, and may, examine into the facts contained in such return, and into the cause of such imprisonment, and thereupon either discharge, or bail, or remand the party so brought, as the case shall require, and as to justice shall appertain,") proceeded to the examination of the prisoner, and of several witnesses, who were produced for and against him.

It appeared, that a theft had been committed at *Kingston*, in *Upper Canada*, on or about the 29th of *June* last, and that one *George Ridout*, upon whom the theft was committed, had 4,000 dollars, or upwards, stolen from him, at a public house in that town. That the prisoner was an inhabitant of *Kingston*, an acquaintance of *G. R.*, and spent the night, or a part of the night, in which the money was stolen, in company with him. That the money stolen consisted of *Montreal* bills, and were said to be five dollar bills. That the prisoner left *Kingston* within the two last weeks on a journey to the *United States*. That he was in company with one *Lyman Parks*, who, on *Tuesday* last, at a bank in *Troy*, offered 900 dollars of *Montreal* bank bills, of five dollars each, to be exchanged, at four per cent. discount, and that the bills received in exchange were immediately handed by *P.* to the prisoner. The circumstances attending the intercourse between the prisoner and *Parks*, and a denial by the prisoner, that he had ever seen or known *Parks* before that time, though it was proved that they had been together previously at *Albany*, and that they came

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down from the *Black river* in company with each other, were the chief grounds of the charge and commitment.

*Cushman*, and *Van Vechten*, for the prisoner, moved for his discharge :

1. Because the Chancellor had no jurisdiction of the case, even admitting the prisoner had stolen the bills in question at *Kingston*, in *Upper Canada*, inasmuch, as our Courts have no concern with crimes committed out of the *United States*, and have no authority to arrest or detain the offender.

2. Because the proof is insufficient to charge the prisoner with the theft, even if it had been committed within this state.

*McManus* and *Paine*, in behalf of the prosecution, referred to *Str. 848. 4 Tawnt. 34, and 1 Chitty on Criminal Law, 18—26*, in support of the jurisdiction.

It is the law of nations to deliver up offenders charged with high crimes, and who have fled from the country where the crimes were committed.

And the civil magistrate may commit them for a reasonable time for that purpose.

THE CHANCELLOR. It is the law and usage of nations, resting on the plainest principles of justice and public utility, to deliver up offenders charged with felony and other high crimes, and fleeing from the country in which the crime was committed, into a foreign and friendly jurisdiction. When a case of that kind occurs, it becomes the duty of the civil magistrate, on due proof of the fact, to commit the fugitive, to the end that a reasonable time may be afforded for the government here to deliver him up, or for the foreign government to make the requisite application to the proper authorities here, for his surrender. Who are the *proper authorities* in this case, whether it be the executive of the state, or, as the rule is international, the executive authority of the *United States*, the only regular organ of communication with foreign powers, it is not now the occasion to discuss. It is sufficient to observe, that if no such application be made, and duly recognized, within a reasonable time, the prisoner

will then be entitled to his discharge upon *habeas corpus*. If the judicial authority has afforded sufficient means and opportunity for the exercise of this act of commutative justice, it has done its duty. Whether such offender be a subject of the foreign government, or a citizen of this country, would make no difference in the application of the principle; though, if the prisoner, as in this case, be a subject of the foreign country, the interference might meet with less repugnance.

This doctrine is supported equally by reason and authority.

*Vattel* observes (b. 2. ch. 6. s. 76.) that to deliver up one's own subjects to the offended state, there to receive justice, is pretty generally observed, with respect to great crimes, or such as are equally contrary to the laws and the safety of all nations. Assassins, incendiaries and robbers, he says, are seized every where, at the desire of the sovereign in the place where the crime was committed, and delivered up to his justice. The sovereign who refuses to deliver up the guilty, renders himself, in some measure, an accomplice in the injury, and becomes responsible for it. Professor *Martens* also, in his *Summary of the Law of Nations*. p. 107., says, that according to modern custom, a criminal is frequently sent back to the place where the crime was committed, on the request of a power who offers to do the like service, and that we often see instances of this.

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Opinion of  
*Vattel*.

Of *Martens*.

Of *Grotius*.

*Grotius*, who is of still higher authority, declares, (b. 2. ch. 21. s. 3, 4, 5.) that the state is accountable for the crimes of its subjects, committed abroad, if it affords them protection; and, therefore, the state where the offender resides, or has fled to, ought, upon application and examination of the case, either to punish him according to his demerit, or deliver him up to the foreign state. He says, further, that his doctrine applies equally to the subjects of the government in which the offender is found, and to fugitives from the foreign state. This learned jurist finally concludes,

+ this

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that this right of demanding fugitives from justice has, in modern times, in most parts of *Europe*, been confined, in practice, to crimes that concern the public safety, or which were of great atrocity, and that lesser offences were rather connived at, unless some special provision, as to them, existed by treaty.

Of *Heineccius*.

*Heineccius*, in his commentary on these passages, (*Prælec. in Grot. h. t.*) admits that the surrender of a citizen, who commits a crime in a foreign country, is according to the law of nations; and he says further, that it is to be deduced from the principles of natural law. We ought either to punish the offender ourselves, or deliver him up to the foreign government for punishment. So *Burlemaqui*, (part 4. c. 3. s. 23 to 19.) follows the opinion of *Grotius*, and maintains that the duty of delivering up fugitives from justice is of common and indispensable obligation.

Of *Burlemaqui*.Of *British Courts*.

It has been frequently declared, that the law of nations was part of the common law of *England*. (3 *Burr.* 1481. 4 *Burr.* 2016.) And if we recur to the *English* decisions, which may be considered as declaratory of public law on the point, we shall perceive a full recognition of this general doctrine.

In *Rex v. Hutchinson*, *Trin.* 20. *Car.* 2. (3 *Keb.* 785.) it appeared to the K. B. on *habeas corpus*, that the defendant was committed on suspicion of murder, in *Portugal*, and the court refused to bail him. And again, in the case of *Colonel Lundy*, (2 *Vent.* 314.) it was agreed, on a consultation of all the judges, that there was nothing in the *habeas corpus* act to prevent a person guilty of a capital offence in *Ireland*, (then a distinct kingdom, though under the same king,) to be sent there to be tried. In the case of *Rex v. Kimberly*, (*Str.* 848. *Barnard. K. B.* vol. i. 225. *Fitzgib.* 111. S. C.) the same point underwent a farther discussion. The defendant being committed by a magistrate, for a felony done in *Ireland*, "to be detained till there should be proper means found out to convey him to *Ireland*,



to be tried," was brought into the K. B. by *habeas corpus*. *Strange*, for the prisoner, moved for his discharge, or for bail, insisting that justices of the peace had no power over crimes in *Ireland*, and that the *proviso* in the *habeas corpus* act gave no power as to offences in *Ireland*, which was a distinct kingdom, and that it was against the *habeas corpus* act to remove the prisoner to *Ireland*. But the court referred to the above cases, and remanded the prisoner; observing that the form of the commitment was proper, and that if the prisoner was not removed to *Ireland* in a reasonable time, application might be again made to the court for his discharge. To the same effect are the observations of the Court of Exchequer, in *East India Company v. Campbell*, (1 Ves. 246.) in which it was said, that "a person may be sent abroad by government and tried, though not punishable in *England*; like a case of one who was concerned in a rape in *Ireland*, and sent over there by the government, to be tried, though the K. B. refused to do it. Government may send persons to answer for a crime wherever committed, that he may not involve his country, and to prevent reprisals."

In support of the same doctrine and practice, we may refer to the uncontradicted remark of *Heath, J.* in the late case of *Mure v. Kaye*, (4 Taunt. 34.) and which Mr. *Chitty*, in the book cited by the counsel, seems to regard as law. "It has generally been understood," he observes, "that wheresoever a crime has been committed, the criminal is punishable according to the *lex loci* of the country, against the law of which the crime was committed; and by the comity of nations, the country in which the criminal has been found, has aided the police of the country against which the crime was committed, in bringing the criminal to punishment. In Lord *Loughborough's* time, the crew of a *Dutch* ship mastered the vessel and ran away with her, and brought her into *Deal*, and it was held, we might seize them and

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send them to *Holland*. And the same has always been the law of all civilized countries."

Though these observations come in the shape of a *dictum* of a single judge, yet it ought to be understood, that *Heath* was a judge of very great experience, having sat upon the bench of the C. P., for the long period of forty years, and he was right, says Ch. J. *Gibbs*, in most cases that ever came before him.

Lord *Coke's*  
opinion not  
correct.

Lord *Coke* says, (3 *Inst.* 180.) that "it is holden, and so it hath been resolved, that divided kingdoms under several kings, in league, one with another, are sanctuaries for servants or subjects, flying for safety from one kingdom to another, and upon demand made by them, are not, by the laws and liberties of kingdoms, to be delivered." If, by the *laws and liberties of kingdoms*, he means the laws and usages of nations, the remark is unfounded in fact, and contradicted by history, and by the great work of *Grotius*, which was published in the lifetime of Lord *Coke*. With respect to the force and justness of this passage, we may refer to *Wynne's Treatise on the Law and Constitution of England*. (*Eunomus*, *Dialog.* 3. s. 67.) He asks, how has Lord *Coke* supported his doctrine? He says, "it is holden, and so it has been resolved;" but he neither tells us *when*, nor *where*, it was resolved. *Wynne* goes on to observe, that the assertion seems directly against the law of nations, and that, "if, from the very nature of society, subjects are answerable to their own nation for their criminal conduct, by the law of nations, they may be justly demanded of foreign states to which they fly, and the refusal of delivering them up is a just cause of war." He observes, further, that to prevent protection of fugitives by clauses in a treaty, only operates as a recognition, not a creation of right.

*Wynne's Eunomus.*

The 27th article of the treaty of 1795, between the U. S. and G. B. was merely declaratory of the law of nations.

The 27th article of the treaty of 1795, between the *United States* and *Great Britain*, provided for the delivery of criminals charged with murder or forgery; but that article

was only *declaratory of the law of nations*, as were also a number of other articles in the same treaty. This was the case, for instance, with the provision in the 21st article, that it should not be lawful for foreign privateers, who have commissions from a prince or state in enmity with either nation, to arm their ships in the ports of either ; and, also, with the provision in the 25th article, that neither party should permit the ships or goods of the other to be taken by foreign force, within the bays, ports, or rivers, of their territories. These articles, to use the language of *Wynne*, were the recognition, not the creation of right, and are equally obligatory upon the two nations, under the sanction of public law, since the expiration of that treaty, as they were before.

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There is nothing in the *habeas corpus* act which controls the application of this general law. The only provision in it which has any possible relation to the case, is that which declares, " that no citizen of this state, being an inhabitant or resident within it, shall be sent prisoner to any place whatsoever out of this state, for any crime or offence committed within this state." The prohibition is thus expressly confined to crimes committed *within this state*.

It has been suggested, that theft is not a felony of such an atrocious and mischievous nature, as to fall within the usage of nations on this point. But the crimes which belong to this <sup>+</sup> recognition of the law of nations, are not specially defined ; and those which strike deeply at the rights of property, and are inconsistent with the safety and harmony of commercial intercourse, come within the mischief to be prevented, and within the necessity as well as the equity of the remedy. If larceny may be committed, and the fugitive protected, why not compound larceny, as burglary and robbery, and why not forgery and arson ? They are all equally invasions of the rights of property, and incompatible with the ends of civil society. Considering the great and constant intercourse between this state and the provin-

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ces of *Canada*, and the entire facility of passing from one dominion to the other, it would be impossible for the inhabitants on the respective frontiers to live in security, or to maintain a friendly intercourse with each other, if thieves could escape with impunity, merely by crossing the territorial line. The policy of the nation, and the good sense of individuals, would equally condemn such a dangerous doctrine. During the existence of the treaty of 1795, it might well have been doubted, whether the two governments had not, by that convention, restricted the application of the rule to the two specified cases of murder and forgery, for it is a maxim of interpretation, that *enumeratio unius est exclusio alterius*. But if it were so, yet upon the expiration of that treaty, the general and more extensive rule of the law of nations revived.

2. The difficulty, then, in this case, is not as to a want of jurisdiction, but the proof is insufficient to detain the prisoner. There is no evidence that the bills offered in exchange at the bank in *Troy*, were the same bills that were stolen at *Kingston*, and however suspicious the conduct of the prisoner, and his associate, may be, and however untrue his allegations as to *Parks*, yet, as we have no proof that the prisoner committed the theft, or that he or his associate were in possession of the stolen goods, he must, on that ground, and on that ground alone, be discharged.

The evidence to detain the party, for the purpose of surrender, must be sufficient to commit the party for trial, if the offence was committed here. The admonition in *Grotius*, is not to be forgotten—*non decet homines dedere causa non cognita*.

Prisoner discharged.

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v.  
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NICHOLS *against* WILSON and others.

Where an injunction had been granted, on a bill to stay a sale under a power in a mortgage, a few days before the expiration of the *six months*, it was dissolved after answer, on terms: viz. giving six weeks further notice of the time and place of sale, and a reference, in the mean time, to the master to ascertain the balance due, &c.

BILL to stay the proceeding to sell under a power contained in a mortgage, upon a charge that considerable payments have been made, and ~~are~~<sup>one</sup> not credited or allowed, and that, by a parol agreement, when the mortgage was taken, the time of payment was enlarged. An injunction was allowed at the expiration nearly of the six months, on a deposit of a sum sufficient to meet the expenses of advertising, &c.

The answer admitted some payments, and denied others. It denied, also, the parol agreement, and averred that the land was a slender security for the debt, &c.

A motion was now made to dissolve the injunction.

*J. L. Billings*, for the motion.

*D. Russel*, contra.

*Per Curiam.* The motion is granted upon terms, viz. that six weeks further notice be given by the defendants, of the time and place of sale, and that, in the mean time, a reference be had to compute the balance due, and that the master give notice to the solicitor for the plaintiff, of the time and place of such inquiry, and that on the payment or tender of the balance, so to be ascertained, together with the costs of proceeding under the power, and the costs of

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this suit, no sale be had; and, *further*, that no sale be had until the balance shall have been thus ascertained.

The injunction was allowed in *May* last, and within a few days of the expiration of the six months, and it would produce unreasonable delay, to compel the defendants to renew an advertisement for six months. A short additional notice, under the direction of this court, will satisfy the ends of justice, and of the statute, as this court is now in possession of the cause, at the instance of the mortgagor. Six weeks further notice, in connection with the six months already given, will answer all the beneficial purposes of notice, as it respects the plaintiffs, who may want time to redeem, and as it respects the public, who may want an opportunity to buy.

Order accordingly.

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BREGAW against CLAW.

Where a bill was filed against *C.* charging him with fraud and breach of trust, as administrator of *B.*, and the defendant put in an answer, and also a *plea*, stating that all the acts, in relation to the estate of *B.*, were done by him and *V.* jointly, as administrators, to which there was no replication: *Held*, that on the allegation in the plea, *V.* the co-administrator, ought to be made a party; but leave was given to the plaintiff to amend his bill, on payment of costs.

*August 25th.*

THE bill stated, that the plaintiff is one of the children and heirs of *Peter Bregaw*, deceased, and that the *defendant and Barent Vanderpoel* were appointed administrators of *P. B.*, and that the defendant was, afterwards, appointed administrator of *John Bregaw*, one of the sons of *P. B.* and who died without issue, and intestate. The bill charged the defendant with various acts of fraud and breach of

trust, as administrator of *P. B.*, and as administrator of *John Bregaw*.

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To this bill the defendant put in an answer, giving an account of his conduct as administrator. He also filed a plea, alleging that *Barent Vanderpoel* was appointed one of the administrators of *P. B.*, and that all acts, in relation to the estate, were done by him and *Vanderpoel* jointly, and that the latter ought to have been made a party to the bill.

No replication was filed to the plea. The question submitted to the Chancellor was, whether *B. Vanderpoel* ought to have been made a party, according to the allegations in the plea.

*J. Vanderpoel*, for the plaintiff, cited 1 *Johns. Ch. Cas.* 349., and contended that the bill seeks only to charge the defendant for his separate acts.

*Van Buren* and *Butler*, for the defendant, cited 2 *Madd. Tr.* 143. 153. 7 *Ves.* 563. 2 *P. Wms.* 684. 2 *Atk.* 51. 2 *Vern.* 420. 11 *Ves.* 424. *Finch*, 82. 3 *Atk.* 406. *Cooper's Eq. Pl.* 34. 290., and contended, that all trustees, executors, and administrators, &c. must be parties to a suit respecting the subject matter of the trust; and that this case does not fall within any of the exceptions to the general rule.

THE CHANCELLOR said, that in this case, the allegations in the plea were to be assumed as true, and, therefore, the plea must prevail. No reason appeared why the co-administrator was not made a party. Leave was given to the plaintiff to amend his bill, upon payment of costs. (*Mitford's Tr.* 221. 1 *P. Wms.* 428.)

Order accordingly.

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HOWELL

v.

BAKER.

H. HOWELL, assignee of P. HOWELL, *against* BAKER AND CLARK.

Whether an attorney for the plaintiff can purchase the property of the defendant sold under execution, by the sheriff, for his own benefit?

*Quære.*

Where the farm of the defendant, worth two thousand dollars, was sold under a judgment and execution, on which not more than eighty dollars was due, to the attorney of the plaintiff, who attended the sheriff's sale, at the request of the plaintiff, for *ten* dollars: *Held*, that under the circumstances, the purchase by the attorney was not to be considered as absolute, or intended originally for his own benefit, but in *trust* for the respective interests of the parties to the execution; and the debtor, on a bill filed by him for that purpose, was allowed to redeem the estate, on paying the balance due on the execution, and the amount paid by the attorney, with interest, &c.

*It seems*, that the gross inadequacy of price, connected with the facts, that the sale was on a stormy day, when no person but the attorney and deputy sheriff were present, might have warranted the inference of *fraud*, if the conclusion, that the purchase was made in trust, had not been a sufficient ground for letting in the debtor to redeem his estate.

*September 4th.*

BILL filed *January* 19th, 1818, to redeem land, purchased by C. Baker, defendant, at the sheriff's sale, under circumstances which, as was alleged, constituted him a trustee for P. Howell, the defendant in the execution. A judgment was recovered in *September*, 1809, in the *Ulster* Court of C. P. against P. H., at the suit of J. R. Boyd, for 112 dollars and 95 cents, in which suit C. B., the defendant, and another, were the attorneys for the plaintiff. A *fi. fa.* was issued, and in 1810, the property of P. H., being a house and about forty acres of land, was advertised for sale. On the 29th of *December*, 1810, P. H. paid the defendant C. B., fifty dollars, and the sale was postponed. The bill



stated, that *P. H.* had paid the deputy sheriff, in *November*, 1809, 27 dollars and fifty cents, and 18 dollars on the execution, in *December*, 1809. The property was again advertised for sale, and sold on the 15th of *May*, 1812, at public auction, by the sheriff, to *C. B.*, (who attended as attorney of the plaintiff, *Boyd*,) as the highest bidder, for 10 dollars. The bill stated, that *P. H.* had made several small payments on the judgment; and that, in 1814, he tendered to *C. B.* the balance due on the judgment, together with the 10 dollars paid by him, amounting, with interest, to 35 dollars and 15 cents, which he refused to accept; and that *C. B.* afterwards sold the premises for 1,200 dollars, to the defendant *Clark*, who purchased, with full knowledge of all the circumstances. The bill prayed, that the defendants might be decreed to release the premises to the plaintiff, and deliver up the possession, &c.

The defendant *B.*, in his answer, denied that he purchased the property with intent to hold it as security only for the balance due on the judgment, but that he purchased for his own benefit. He alleged, that he afterwards paid *Boyd*, the plaintiff, the balance due on the judgment; and that 80 dollars were due at the time of sale.

It appeared from the evidence taken in the cause, that the property, when it was sold at auction in 1812, was worth about 2,000 dollars; that *P. H.* was absent from the state at the time; that it was a stormy day, and no persons but the deputy sheriff and *B.* were present at the sale; that after the sale, *B.* frequently said, that he would give up the property to *P. H.* if he would pay the balance due on the judgment, and the ten dollars, and compensate him for his trouble; that he had told *Boyd*, the plaintiff, that he had bid off the property for him; and that the defendant *C.*, before he purchased, knew all the circumstances.

*B. Robinson*, and *Bristed*, for the plaintiff.

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*P. Ruggles, contra.*

THE CHANCELLOR. The defendant *B.* was one of the attorneys to the execution under which the sheriff sold the land, and it might be a question whether an attorney can, in such case, become a purchaser for his own benefit. He is the agent of the plaintiff, and generally, has the control of the execution, and may direct the time and place of sale. It is well known that the sheriff receives his instructions from the attorney, and usually follows them, under the general regulations of the statute, in pressing, or in postponing the sale, and as to the terms to be prescribed, and the particular parts of the real estate to be selected. It is dangerous to allow a person who has such a material agency in the sale, the capacity of buying in, on his own account. He who is entrusted with the business of others, ought not to be allowed to make that business an object of interest to himself. It tends to abuse and corruption. It is upon this principle that the assignees of a bankrupt are not allowed to become purchasers on the sale of the bankrupt's estate. The bringing it to sale, and the time and manner of the sale, are very much in their power. A purchase by the solicitor of the assignees is supposed to be within the reason of the prohibition, for he is their agent to direct the sale; and those who have a duty to perform for others, should not, in the discharge of that very duty, deal for themselves. It has accordingly been held, in *England*, (*ex parte Hughes*, 6 Ves. 617. *Ex parte James*, 6 Ves. 337.) that purchases of the bankrupt's estate, at public sale, by the assignees, or their agent or solicitor, are not valid, but will be considered as made in trust for the persons entitled to the surplus, and will be set aside on equitable terms. In *Hall v. Hallet*, (1 Cox, 134.) Lord Thurlow observed, that "no attorney can be permitted to buy in things in a course of litigation, of which litigation he has the management. This the policy of justice will not endure."

But though the rule disqualifying trustees, and particularly solicitors and attorneys, from purchasing at sales brought about through their agency, has strong pretensions to be applied to this very case, I do not perceive it to be incumbent upon me, at present, to decide that point. The purchase by the defendant *B.* was made under special circumstances, which are sufficient, of themselves, (and particularly when taken in connection with his character as attorney to the execution,) to constitute him a trustee for the parties, whose interests were concerned in the sale. *Boyd*, who was plaintiff in the execution, directed the defendant *B.* to attend and bid off the property; and the defendant *B.*, afterwards, confessed to his client, that he had done so, and that the deed would be executed to *Boyd*. He, also, admitted to *Howell*, the defendant in that execution, that he had made a temporary sale of the property, to prevent the expense of further advertising it, and that he would receipt the execution as soon as it was paid up. These two witnesses establish the fact that the purchase was not intended, at the time, to be absolute, and for the benefit of *B.* In addition to this proof, the facts admitted by the defendant *B.*, in his answer, that there was <sup>were</sup> not above eighty dollars due on the execution, at the time of sale, including his costs, and that he bid only ten dollars, though he afterwards discharged the execution, and sold the farm for 1,200 dollars; lead strongly to the same conclusion.

It would be very inequitable, even if it were lawful, to allow the purchaser, in such case, to appropriate the bid to himself. *Non omne, quod licet, honestum est*, is the observation of *Paulus*, as quoted in the *Digest*; (50. 17. 144.) and we have a similar observation from another *Paul*, who received inspiration from a purer source than the *Roman* law. (1 *Cor.* vi. 12.) +

Indeed, such gross inadequacy of price, when taken in connection with the fact that the sale was on a stormy day, and

+ "all things are lawful unto me. But all things are not expedient: all things are lawful for me, but I will not be brought under the power of any."

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that no persons were present but the sheriff and the defendant *B.*, would well warrant an inference of fraud on any other ground than the one I have taken. The most reasonable conclusion, and the only one honourable to the defendant *B.*, is, that the purchase was intentionally made, at the time, in trust for the respective interests of the parties to the execution.

*Howell* did nothing, afterwards, to release his right, and discharge the trust, and when *B.* sold to the defendant *C.*, the right of *Howell*, or his assignee, to redeem the property, existed in full force.

Nor is the defendant *C.* entitled to protection as a *bona fide* purchaser, without notice. It is clearly established by the testimony, that he purchased with knowledge of all the material circumstances attending the purchase by *B.*, and the right of redemption remained in full force against him. He purchased at his peril, and after being duly apprized of the infirmity of the title of *B.*

I shall, accordingly, decree, that the plaintiff is entitled to redeem the estate, upon paying the balance due upon the execution, with interest, after deducting all payments made by *Howell* to the sheriff, or to the defendant *B.*, and upon paying the amount, with interest, of all the incumbrances upon the estate existing at the time of the sale, and subsequently discharged by either of the defendants, and upon paying the cash value of all *bona fide* and substantial improvements made by the defendant *C.*, since his purchase. I shall direct a reference to ascertain the amount of the same.

Decree accordingly.

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HAYES  
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WARD.

HAYES against WARD and others.

A surety, who pays the debt, is entitled to be put in the place of the creditor, and to all the means, and to every remedy which the creditor possesses, to enforce payment from the principal debtor.

If, therefore, a creditor takes a mortgage from the principal debtor, he gives it not only for his own security, but for the indemnity of the surety, and he must do no act by which it may be invalidated, in the first instance, or be subsequently defeated or destroyed.

Whether a creditor can be compelled to resort to the principal debtor, in the first instance, and exhaust his remedies against him, before he can sue the surety? *Quære.*

But where a surety apprehends danger from the delay of the creditor, he may compel the creditor to sue the principal debtor; at least, on indemnifying the creditor for the consequences of risk, delay, or expense.

A creditor in *New-Jersey*, where all the parties resided, took from *B.*, the holder of a promissory note endorsed by the plaintiff, on a loan of money alleged to be usurious, a bond and mortgage, which was ample security for the debt; and instead of resorting to the bond and mortgage, or to the principal debtor, sued the plaintiff, (while transiently in this state) at law; but this Court granted an injunction to stay the suit at law, until the creditor had pursued his remedy on the mortgage in *New-Jersey*; reserving the question of costs, and all other questions, until the further application of the creditor.

THE bill, which was filed May 30th, 1816, stated, that the plaintiff, *David Hayes*, and the defendants, *Thomas Ward*, *Nathaniel Camp*, and *Cyrenus Beach*, resided at *Newark*, in the state of *New-Jersey*. That the defendant *C. B.* applied to *Joseph Walter*, a partner in trade with *Silas Hayes*, for money; and proposed to furnish notes, with which to raise five thousand dollars, and as an inducement to *W.*, proposed to take him into partnership, in a manufacturing establishment, &c. *J. W.*, on the 1st of May, 1811,

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and Sept. 6th.

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made a note, in the name of the firm of *Walter & Hayes*, for 1,000 dollars, payable in two years, to the plaintiff, *D. H.*, who endorsed it, for the accommodation of the makers, supposing it to be for their use, his son being one of the firm of *W. & H.* Another note of the same date, and for the same sum, was made by *J. W.*, in the name of *W. & H.*, payable two years after date to *Aaron Reff*, who endorsed it, and is since deceased. That on the 19th of *May*, 1811, two other notes were made by *W. & H.* for one thousand dollars each, payable in two years, to the defendant *C. B.*, and endorsed by him; and he gave a receipt, dated the 27th of *May*, 1810, to *W.* for the four notes, stating that he had received them on account of two lots of land in *Newark*, sold to *J. W.*, but which were in fact never sold, being part of the intended manufacturing establishment, which was abandoned. That *C. B.*, also, obtained from *J. W.* two other notes, one for 750 dollars, dated the 1st of *April*, 1811, made by *Mark Walter*, payable in two years, and the other for 450 dollars, made by *John Tremore*, payable in one year, for which he gave a receipt, on account of the lots of land, and stating, that he was to account for them to *J. W.* on demand. With these six notes, *C. B.* applied to *T. Ward*, the defendant, to borrow money; and it was agreed that *T. W.* should transfer to *C. B.* fifty-eight shares in the *Newark Banking and Insurance Company*, and that *C. B.* should thereupon endorse to *T. W.* the six notes, amounting to 5,200 dollars, and secure the payment by his bond, and a mortgage on real estate in *Newark*; this agreement was carried into effect on the 3d of *June*, 1810; and the mortgage, which was duly registered, was ample security for the amount of the notes, it being the first mortgage. That *C. B.* applied to his own use all the money so raised, and disposed, also, of the bank shares for his own benefit. The bill charged, that the transaction relative to the loan between *T. Ward* and *C. B.*, was usurious, and by the law of *New Jersey*, the notes, bond, and mortgage, &c., taken as security.

on such various loan, are void. That *W. & H.*, the makers of the note, soon afterwards, became insolvent, and absconded; that *M. Raff* is dead, and that in 1815, *C. B.* became insolvent, and gave a second mortgage on his property to *T. W.* That the defendant *N. C.*, having obtained a judgment against *C. B.*, for 5,000 dollars, issued an execution, which was levied on the equity of redemption of *C. B.* in the mortgaged premises, and sold in December, 1815, and *N. C.* became the purchaser at the sheriff's sale, knowing at the time, all the transactions above mentioned, between *J. W.* and *C. B.*, and between *T. W.* and *C. B.* That the plaintiff, also, at the time of the sale, gave notice of these things to the said *N. C.* before he purchased, and cautioned him against the purchase. That the said *T. W.* instead of seeking payment of the notes from *C. B.* or *N. C.*, or from the mortgaged premises, took advantage of the plaintiff being in New-York, on occasional business, and had him arrested, in an action at the suit of *T. W.*, in the Supreme Court of this state, on the note for 1,000 dollars, endorsed by the plaintiff, and the plaintiff put in special bail to the action, in which a declaration was filed of May term 1818. The bill prayed, that the defendant *T. W.*, might be decreed to release and discharge the plaintiff from his endorsement, without prejudice to the rights of *T. W.*, under the mortgage, or against *C. B.*; and that he be perpetually enjoined from prosecuting his action, or any other action at law, against the plaintiff, by reason of the said endorsement, and pay to the plaintiff his costs and charges, &c.

The bill was taken, *pro confesso*, against the defendants, *Camp* and *Beach*. The defendant *Ward* demurred to that part of the bill which sought a discovery from him, in relation to any application to him by *C. B.*, to raise money for *C. B.*'s use, or to any negotiation between them, respecting the transfer of the notes, or the consideration of the transfer, or as to any matters which might subject the defendant

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to any penalty or forfeiture. The defendant *T. W.* answered to the residue of the bill, admitting the making and endorsing the notes, the bond and mortgage, and that the mortgage is a sufficient security, and a valid lien on the property; and, also, the second mortgage, and the transfer of the notes to him, but denied all knowledge of the consideration of them. He admitted, that the parties all resided in *New-Jersey*, and the statute of that state relative to usury, and the insolvency of *W. & H.*, and the judgment and execution of *N. C.*, and the sale of the equity of redemption, &c.

The demurrer was argued and allowed in September, 1818, and a decree thereon entered in favour of *T. W.*, exempting him from making any answer to the parts of the bill demurred to.

June 15th.

*Riggs*, for the plaintiff, contended, 1. That the demurrer put in by *T. W.* was an implied admission of the invalidity of the bond and mortgage.

2. That as the plaintiff is a mere surety, the estate of the principal debtor ought first to be resorted to for payment.

3. That as the defendant *T. W.* insists on the validity of the bond and mortgage, and the sufficiency of the mortgaged premises, he ought to be perpetually enjoined from proceeding against the plaintiff.

4. That *C. Beach* was the principal debtor was fully proved, and not denied by *T. W.*, the defendant.

5. That if *T. W.* is not to be perpetually enjoined, he ought, at least, to be enjoined until he has exhausted his remedy against the mortgaged property, and until the further order of the court, founded on the result of his proceedings on the bond and mortgage, and that he ought to pay costs; and that if he failed to recover on the bond and mortgage, on the ground of their legal invalidity, it would be a bar against his recovery of the plaintiff, resulting from his own act, in poisoning the security with usury. But that this question

+ The fact was



would not arise until the defendant *T. W.* came back to this court for further directions.

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6. That if the plaintiff ought to pay, and take the bond and mortgage for his indemnity, which would be the common rule of equity, if there was nothing peculiar in the case, the defendant *T. W.* ought to be directed to assign the bond and mortgage to the plaintiff, with a *covenant* as to their legal validity, since he asserts them to be valid; and if they are not, it is owing to his own unlawful bargain, when he took the note endorsed by the plaintiff.

7. That the plaintiff cannot plead usury, at law, because the usury arose after the notes were endorsed. The defendant *T. W.* ought, therefore, to litigate the question of usury in *New-Jersey*, at his own risk and expense. That if the plaintiff is obliged to pay the defendant *T. W.*, and take the bond and mortgage, and that security fails, he will then lose his indemnity.

*C. Baldwin*, for the defendant, *T. Ward*, contended,

1. That a creditor has a right to sue the security, in the first instance; and a judgment against him may be requisite for his security.

2. That if the pledge be invalid and rotten, the defendant ought not to be compelled to rely upon it.

3. This court will leave the parties to their legal rights and remedies.

4. That the plaintiff cannot ask the defendant to pay costs, on a bill for a perpetual injunction.

5. That if the plaintiff comes here for relief against the usury, he ought to have brought into court the sum really due to the defendants.

THE CHANCELLOR. It appears from the case that the defendant *Beach* is the principal debtor to the defendant *Ward*, on the note in question, and that the plaintiff who endorsed

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it, stands in the character of surety. The plaintiff originally endorsed the note without consideration, for the benefit of the drawers, *W. & H.*, and the defendant *B.* took it from the drawers, in consideration of lots agreed to be sold to one of the makers, or of a partnership, into which one of them was to be admitted. This consideration failed, for the lots were not sold, nor the partnership entered into. As between those original contracting parties, the note was without consideration, and could not have been enforced. When the note was passed by the defendant *B.* to the defendant *W.* the dealing was exclusively between these two defendants, and the plaintiff's name remained on the note, as endorser, without any consideration for his endorsement. We have no direct evidence that the fact of his being a naked guarantor, or surety, without interest, was known to the defendant *W.*, when he received this and the other notes from *B.*, yet the facts are sufficient to justify such an inference. The note was not received by the defendant *W.* in the ordinary course of commercial business. It was taken upon the sale of bank shares; and instead of relying upon the credit of the prior parties to the note, accompanied with the endorsement of the defendant *B.*, he took a bond and mortgage from *B.*, as eventual security for the payment of the note. This and the other notes were sold by *B.* to the defendant *W.*, almost immediately after they were drawn, and the defendant *W.* admits that they were received by *B.* from one of the makers; nor does he deny a knowledge of that fact, at the time he took the bond and mortgage from *B.*

The knowledge of that fact was sufficient notice to him, that the plaintiff was a voluntary endorser, for the accommodation of the makers; and the defendant *W.* appears, from the pleadings and proofs, to be justly chargeable with knowledge, at the time he took the mortgage, that the plaintiff was a gratuitous endorser. The plaintiff is then entitled, in equity, to all the privileges with which a surety is clothed,

not only as it respects the defendant *B.*, but as it respects the defendant *Ward*, the present holder. I shall, therefore, in the further consideration of this case, assume the fact as clearly true, and well established; that between the plaintiff and the defendants, *W.* and *B.*, the relationship existed of creditor on the one part, and principal debtor and surety on the other. This relationship was coeval with the bond and mortgage, and the parties to this suit are entitled to all the rights, and bound by all the duties resulting from that relation.

The grave and difficult question then presents itself, whether the defendant *W.* ought to be required to resort, in the first instance, to the mortgage which he took from *B.*, and which he says is a valid lien, and sufficient to satisfy the note?

It is alleged that the mortgage security is destroyed by the usury, and that it would be unavailing in the hands of the plaintiff, if he were to pay the note, and have the bond and mortgage assigned to him, (and which, as surety, he would have a right to demand) by way of substitution and indemnity. It is further alleged, that if the defendant *W.* has destroyed the validity of his own security taken from the principal debtor, he cannot have recourse to the plaintiff, because he has voluntarily disabled himself from affording to the plaintiff, as surety, the requisite substitution. The right of substitution is a valuable right belonging to a surety, and the creditor must do nothing to impair it.

There would be much equity in the plaintiff's case, if it should finally appear that the defendant *W.* had by his own act rendered the adequate security which he took from the principal debtor, illegal and void. The very taking of that security by him may have excited confidence in the surety, and lulled him to sleep, and deprived him of taking other and sound security; for his own eventual responsibility, until it was too late, and the rights of third persons had interven-

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The surety who pays the debt, is entitled to be substituted in the place of the creditor as to all the security or means possessed by the creditor, to enforce payment of the principal debtor.

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The creditor, therefore, can do no act to invalidate or discharge the security he has taken from the principal debtor, to the prejudice of the rights of the surety.

ed. This consideration renders it an act of benevolence and equity, and imposes it as an obligation upon the creditor who takes security from the principal debtor, to take it fairly and lawfully, and to hold it impartially and justly. According to the doctrine of the civil law, the surety may *per exceptionem cedendarum actionum*, bar the creditor of so much of his demand as the surety might have received, by an assignment of his lien and right of action against the principal debtor; *provided* the creditor had, by his own unnecessary or improper act, deprived the surety of that resource. The surety, by his very character and relation of surety, has an interest that the mortgage taken from the principal debtor, should be dealt with in good faith, and held in trust, not only for the creditor's security, but for the surety's indemnity. A mortgage so taken by the creditor, is taken and held in trust, as well for the secondary interest of the surety, as for the more direct and immediate benefit of the creditor, and the latter must do no wilful act, either to poison it, in the first instance, or to destroy or cancel it, afterwards. These are general principles founded in equity, and are contained in the doctrines laid down in *Pothier's Treatise on Obligations*, (No. 496. 519, 520.) to which reference has been made in the former decisions of this court. (*Cheesebrough v. Millard*, 1 Johns. Ch. Rep. 414. *Stevens v. Cooper*, 1 Johns. Ch. Rep. 430, 431.)

This doctrine does not belong merely to the civil law system. It is equally a settled principle in the *English* Chancery, that a surety will be entitled to every remedy which the creditor has against the principal debtor, to enforce every security, and to stand in the place of the creditor and have his securities transferred to him, and to avail himself of those securities against the debtor. This right of the surety stands not upon contract, but upon the same principle of natural justice, upon which one surety is entitled to contribution from another. (2 Ves. 622. 1 *Wightwick*,

2-6. 1 *Deaussure*, 409. 2 *Madd. Ch. Rep.* 437. 14 *Ves.* 162. 10 *Ves.* 412. 11 *Ves.* 22.) (a.)

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But the application of these principles is not, necessarily, the question, at present. If the defendant *W.* should be required to prosecute previously upon his mortgage, and he should be defeated in that remedy, by the invalidity of the mortgage, arising from his own illegal act, and should then recur back to the plaintiff, it would be in time to examine whether this case fell within the range of the doctrine to which I have referred. The only point now to be settled is, whether the defendant *W.* shall be stayed in his suit at law, until he has tried his remedy against the mortgaged premises.

I am not aware, that there is any general rule in Chancery, that the creditor must look to the principal debtor, and exhaust his remedy against him, before he can be permitted to resort to the surety. The general language in the books and the practice have been otherwise, and the surety has been considered (without any formal adjudication upon the point, and, perhaps, without any examination of it upon principle) as amenable, in ordinary cases, to the creditor, in the first instance, though the creditor may have taken ample security from the principal debtor. The creditor has usually called on the surety at his election, and left him to resort to the principal debtor for his indemnity, after he has paid the debt, and after he has been clothed, by substitution, with all the rights and securities of the creditor. "The holder of the security, therefore, in general cases," says Lord Eldon, in *Wright v. Simpson*, (6 *Ves.* 734.) "may lay hold of the security; and till very lately, even in circumstances, under which the security would not have had the same benefit, that the creditor would have had." But in late cases, and under particular circumstances, Lord El-

Whether a creditor can be compelled in equity to resort, in the first instance, to the principal debtor, before he can sue the surety? *Quere.*

(a) Vide *Clason v. Morris*, 10 *Johns. Rep.* 524. S. P.

+ surety

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A surety apprehending danger from the delay of the creditor, may come into this Court and compel the creditor to sue the principal debtor, on giving an indemnity against the consequences of risk, delay, and expenses.

don admits, that the surety has a right to call upon the creditor to do the most he can for his benefit.

It is now considered as a settled rule, (see the cases referred to in *King v. Baldwin*, 2 Johns. Ch. Rep. 362. and 3 Merivale, 579.) that a surety may resort to Chancery, if he apprehends danger from the creditor's delay, and compel the creditor to sue the principal debtor, though, probably, he must indemnify the creditor against the consequences of risk, delay, and expense. This is what Lord Eldon supposes in the case already referred to. As early as the time of Lord Keeper North, (1 Vern. 190.) it was held, that equity would compel the principal debtor to pay the debt, after it had become due, at the instance of the surety, and though the latter had not been sued; for it was

un—"reasonable that a man should always have such a cloud hanging over him." It seems, also, to be now considered, (2 Fonb. 302. n. l. 17 Ves. 517. 520.) as the right of a surety to call upon a creditor having another fund, which the surety, cannot make available, and to require him to resort to that fund in the first instance and exhaust it. And it is now settled, that the surety may require the creditor upon a proper indemnity, to go and prove his bond under a commission of bankruptcy of the principal debtor, and the creditor will be a trustee for the dividends to the surety paying the whole. (*Beadmore v. Cruttenden*, 1 Cook's Bank. Law 211. 10 Ves. 414. 6 Ves. 734.) The case of *Wright v. Nutt*, (1 H. Black. 136. 3 Bro. 326.) which underwent great discussion, and which was much questioned, though not overruled, by Lord Eldon, in *Wright v. Simpson*, (6 Ves. 714.) may be cited for the principle, that there are cases in which a creditor may, in equity and good conscience, be compelled to resort to a particular fund, before he pursues the debtor personally. One circumstance that led Lord Thurlow, Lord Kenyon, and, afterwards, Lord Rosslyn to that decision, was, that the creditor could not assign the benefit of the fund to the debtor. It is easy to perceive that

A creditor having a particular fund, may be compelled to resort to that fund, before he pursues the debtor personally.

such a principle applies with much greater force to the case of a surety, and to a fund or pledge, created at the time of the original transaction between the parties. But all the instances to which I have alluded, may be considered as cases of a special nature; they do not appear to establish any such *general* rule as that derived from the civil law, requiring the principal debtor to be first sued, which rule prevails in all those countries where the civil law is an essential part of the municipal law of the land.

According to the *Roman* law, in use before the time of *Justinian*, the creditor, as with us, could apply to the principal. *Jure nostro est potestas creditori, relicto reo, eligendi fidejussores*; (*Code*, 8. 41. 5.) and the same law was declared in another imperial ordinance. (*Code*, 8. 41. 19.) But *Justinian*, in one of his *Novels*, (*Nov.* 4. c. 1. entitled, *Ut Creditores primo loco convenient principalem*,) allowed to sureties the exception of discussion, or *beneficium ordinis*, by which they could require, that before they were sued, the principal debtor should, at their expense, be prosecuted to judgment and execution. It is a dilatory exception, and puts off the action of the creditor against the surety, until the remedy against the principal debtor has been sufficiently exhausted. This provision in the *Novels*, has not been followed in the states and cities of *Germany*, except in *Pomerania*; (*Heinac. Elem. Jur. Germ.* lib. 2. tit. 16. s. 449, 450, 451. 485.) but it has been adopted in those other countries in *Europe*, as *France*, *Holland*, *Scotland*, &c. which follow the rules of the civil law. (*Pothier's Trait. des Ob.* No. 407—414. *Code Napoleon*, No. 2021, 2, 3. *Voet, Com. ad Pand.* tit. *De Fidejussoribus*, 48. 1. 14—20. *Hub. Prælec.* lib. 3. tit. 21. s. 6. *Ersk. Inst.* 504. s. 61.) A rule of such general adoption shows that there is nothing in it inconsistent with the relative rights and duties of principal and surety, and that it accords with a common sense of justice, and the natural equity of mankind.

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+ the surety before applying to

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Where a creditor, who held a bond and mortgage taken in *New-Jersey*, where all the parties resided, as security for a note endorsed by the plaintiff, and transferred by B. to the creditor, on an usurious loan, instead of resorting to the mortgage or the principal debtor, sued the plaintiff, while in this state, as endorser; this Court granted an injunction to stay the suit at law, until the creditor had pursued his remedy on the mortgage.

Without meaning, however, to lay down any such general rule, (and for which I have not seen any sufficient authority in the equity jurisprudence of *England*;) I think there are peculiar circumstances, in this case, to call for a continuation of the injunction upon the suit at law, until the defendant *W.* has pursued his remedy upon the mortgage. The defendant *W.* has shown a distrust of the validity of the mortgage by his demurrer, and by omitting to prosecute either the plaintiff, or the defendant *B.*, in *New-Jersey*, where they all reside, and where no impediment to a suit appears to exist, and by prosecuting the plaintiff, while on a temporary visit to *New-York*. The defendant *W.* ought to be obliged, under such a just suspicion of his case, to try the validity of his mortgage, at home, and not to compel the plaintiff to pay, and then turn over to him a pledge, which if frail and insecure, has been rendered so by his own illegal act. I put this case entirely upon the ground of the allegation, to which no answer has been given, that the mortgage is infected with usury, and would be useless and void, if placed, by substitution, in the hands of the surety. If this should happen to be the case, the plaintiff, on paying, might be deprived of all indemnity from his principal, by reason of the conduct of the creditor.

Nor does it appear to be necessary, that the suit at law should proceed to judgment, for there is no allegation of any apprehension of the plaintiff's insolvency, and the mortgage, if good, is admitted to be an ample security.

I shall, accordingly, continue the injunction, until further order, to the end that the defendant *W.* may make a fair experiment with his remedy upon the mortgage, before he applies for leave to proceed in his suit at law; and the question of costs, and all other questions arising upon this case, are reserved until such further application.

The following order was entered: "It is ordered, &c. that the injunction issued in this cause, against the defend-



ant *Thomas Ward*, restraining him from proceeding against the plaintiff in the action at law, in the pleadings mentioned, he continued until the further order of this Court to the contrary; and that the said defendant, *Thomas Ward*, be, and he is hereby prohibited from proceeding in the said action at law, in the pleadings mentioned, and in any other action at law, against the plaintiff, in the promissory note in the pleadings mentioned, endorsed by him, until the defendant, *Thomas Ward*, shall have pursued and exhausted his remedy at law and in equity, on the bond and mortgage in the pleadings mentioned, given by the defendant *Cyrenus Beach*, to the defendant *Thomas Ward*, as a further security for the payment of the said promissory note, endorsed by the plaintiff, and other promissory notes in the pleadings mentioned, and until the further order of this Court to the contrary. And it is further ordered and decreed, that after the said defendant, *Thomas Ward*, shall have pursued and exhausted his remedy on the said bond and mortgage, as aforesaid, if he shall be unable to obtain by means of the said bond and mortgage, payment and satisfaction of the money due on the said promissory note, endorsed by the plaintiff, he shall be at liberty to apply to this Court for further directions, with respect to the said injunction, and his further proceedings at law, against the plaintiff, on the said promissory note, endorsed by him in the pleadings mentioned; in which case, the defendant *Thomas Ward*, is to satisfy this Court as to the steps he may have pursued upon the said bond and mortgage, and why he has not been able to obtain satisfaction of the said note, or the amount thereof, if such shall be the case; and the question of costs, and all further directions, are reserved for the further consideration of this Court."

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SHEPHERD  
v.  
M'EVERS.

SHEPHERD, survivor, &c. against M'EVERS and others.

Where trustees have accepted the trust, and entered on its execution, they, cannot, afterwards, without the consent of the *cestui que trust*, or the direction of the Court, surrender, or discharge themselves of the trust.

The vested interest of a *cestui que trust*, cannot be impaired or destroyed by the voluntary act of the trustee; but the trust will follow the land in the hands of the person to whom it has been conveyed by the trustee, with knowledge of the trust.

Though a trust be created for the benefit of a third person, as a creditor, without his knowledge, at the time, he may, afterwards, affirm the trust, and enforce its execution.

As where S., such *cestui que trust*, resided abroad, and before he was informed of the trust, created by the deed of his debtor, for the benefit of his creditors, the trustees, without the direction of this court, conveyed the trust estate to others, upon other trusts and conditions, which, in their operation, would have excluded S. from all share or benefit in the joint estate; the trustees, in the second deed, were held chargeable with the trusts contained in the first deed, of which they had full knowledge at the time.

September 8th.

BETWEEN the years 1795 and 1812, *Theophylact Backe* became indebted to the firm of *Sauer, Eyre & Co.* of *Sheffield*, in *England*, of which the plaintiff is surviving partner; the amount of which debt, including interest, as stated in the account annexed to the bill, was 402l. 3s. sterling. *T. B.* having become insolvent, on the 8th of *June*, 1807, executed a conveyance to *M'Evers* and *Leispenard*, defendants, as joint tenants in fee, of certain real estate in the city of *New-York*, and in the county of *Essex*, in trust, to sell and mortgage the same, as, and when, they should deem it expedient, and apply the moneys arising from the sale, or mortgages, to pay the debts of *T. B.* and such responsibilities which they, the said *M. & L.* might incur, in the management of his concerns, "or such of them as the said

+ trust

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trustees might deem it expedient to pay," and where the debts, responsibilities, and all necessary costs, &c., were paid and discharged, the trustees were to reconvey what remained of the said property, &c. The trustees accepted the trust, and entered on the execution, paid some debts, and incurred the responsibilities. On the 9th of October, 1807, an indenture was executed between *T. B.* of the first part, the said trustees, *M. & L.* of the second part, and *E. B.*, *J. W.*, *C. R.*, *S. D.*, and *J. S.*, creditors of *T. B.* and *A. B.*, defendants, of the third part, and the five persons named, and the several other creditors of *T. B.* and *A. B.* &c., who should execute the deed within the time therein mentioned, (three months,) of the fourth part. After reciting the former deed of trust, and that *M. and L.* had incurred debts and responsibilities for *T. B.* to a large amount, &c. that they had not sold any part of the estate so conveyed to them in trust, and had, at the request of the parties of the third part, in behalf of the creditors, &c. *declined to act in the trust*, and for the purpose of vesting the said property in the parties of the third part, &c., the parties of the first and second parts sold and conveyed all the said trust property, and all the estate, real and personal, of *T. B.*, &c. to the parties of the third part, in trust, to sell, and out of the proceeds, to pay, (1.) what was due to *M. and L.* with interest: (2.) to pay an annuity of 1,000 dollars a year, to *T. B.* for life: (3.) to pay costs and expenses, &c., and to divide the residue between the parties of the third part, and the other creditors of *T. B.* and *A. B.* who should come in and execute the deed in three months from the date, in equal proportion, according to the quantum of their debts, &c.

The bill, which was filed in June, 1816, prayed for a discovery, and an account, and that the deeds of trust might be brought into court and cancelled, &c., and for general relief.

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v.  
*McEvers.*

September 8th.

*Woodward*, for the plaintiff.*D. B. Ogden*, for the defendant.

THE CHANCELLOR. *Theophylact Bache* was indebted, on the 8th of June, 1807, to the house of *Sauer, Eyre & Co.* of which the plaintiff is the survivor. This appears very clearly from the certificates of *T. B.* of the 22d of May, 1795, and the 17th of February, 1798, and from the testimony of *J. O. Hoffman, N. Van Antwerp*, and *Andrew Bache*. The last of these witnesses proves the confessions of *T. B.* a short time before his death, in 1807, as to the existence and validity of the debt.

Being so indebted, *T. B.* on the 8th of June, 1807, conveyed his real estate in the city of *New-York*, and in the county of *Essex*, to the defendants *McEvers* and *Lispenard*, in trust, to pay his debts. These defendants accepted that trust, and entered upon the execution of it, and it was not in their power, without the assent of the *cestui que trust* (of which the house of *Sauer, Eyre & Co.* were one,) or without the direction of this court, to discharge themselves of the trust. I take this to be a clear and settled rule of the court. It appears, however, that on the 8th day of October, following, those defendants, without such assent or direction, united with *T. B.* in a conveyance of that estate to the other defendants, upon other trusts and conditions, which, in their operation, excluded the plaintiff from all benefit under either deed. This conveyance was evidently a breach of trust; and as the grantees in the second deed had knowledge, at the time, of the first deed, and of its contents, they became chargeable with the trusts contained in the first deed. The vested interest of a *cestui que trust*, cannot be impaired or destroyed by such a voluntary act of the trustee, and the trust will follow the land in the hands of any person taking it with knowledge of the trust. Though a trust be created for the benefit of a third person, without his knowledge at the

time, he may, afterwards, affirm the trust, and enforce its execution; (3 *Johnson's Ch. Rep* 281.) but in this case, the trust was violated by the creation of a different trust, before the house of *Sauar, Eyre, & Co.*, in *England*, had due opportunity to act under it.

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v.  
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I shall, accordingly, decree, that a reference be had to ascertain and report the amount of the plaintiff's debt, as shown by the proofs and exhibits in this cause, after making all just allowances, and that the master take an account of the proceeds of the real estate mentioned in the deed of the 6th of June, 1797, and of the debts chargeable thereon, under the said deed, and how much of these proceeds has come to the hands of the defendants, or either of them, and of the investment and disposition of these proceeds, or any part thereof, by way of payment, or otherwise, or of the lands, or any part thereof, by the defendants, or any part of them, and that he have power to examine the parties upon oath, and to take such proof, by witnesses, not already examined, as either party may produce, and that the question of costs, and all other questions, be, in the mean time, reserved.

Decree accordingly.

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PERINE  
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## C. &amp; S. S. PERINE against DUNN.

On a bill to redeem, or for the foreclosure of a mortgage, the time allowed for the redemption is not fixed and certain; but rests in the sound discretion of the Court, to be regulated by circumstances.

The usual time, on a bill to redeem, is *six months*, from the liquidation of the debt by the Master's report; and it *seems*, that the time allowed will not, afterwards, be enlarged.

On bill a for *foreclosure*, the time may be enlarged from *six months* to *six months*, or from *three months* to *three months*, upon equitable terms, and according to the circumstances of the case; but this rule of practice applies only to bills of foreclosure, strictly so called, where the equity of redemption is barred by the decree, and a complete title vested in the mortgagee; and not to cases of a decree for a sale of the mortgaged premises, according to the usual practice in this Court.

Where a party fails to redeem within the time allowed, it is usual to dismiss the bill, which amounts to a bar of the equity of redemption. Where a bill is dismissed on the merits, without any direction that the dismissal shall be without prejudice, it may be pleaded in bar to a new bill for the same matter.

Where a bill was not simply to redeem, but, also, to set aside a mortgage, *three months* only were allowed to the mortgagor; and where the mortgagee has been detained from his remedy on the mortgage, for many years, by a long and tedious litigation, payment may be required in a shorter time, as *thirty days* after the final decision of the cause.

THIS cause came before the Court upon exceptions to the Master's Report, in respect to the amount due to the defendant upon the mortgage which the plaintiff, *C. Perine*, wished to redeem. (See S. C. vol. 3. p. 508.)

THE CHANCELLOR having corrected the report, and determined, upon the facts contained in a special report of the Master, the amount of the principal and interest due upon the bond and mortgage, decreed, that the plaintiffs should

pay the same, together with the costs of this suit, and certain costs directed to be paid by the former decree of the 28th of *September* last, *within three months*, or that the bill stand dismissed with costs. He said it might be proper here to give some explanations on the subject of these allowances of time, made in a decree to redeem or foreclose.

The period of six months was allowed by Lord *Hardwicke*, in the case of *Proctor v. Oates*, (2 *Atk.* 139.) which was upon a bill to redeem. The six months were computed from the date of the Master's Report ascertaining the amount due upon the mortgage, and upon default, the bill was to be dismissed. From what Lord *Eldon* said, in *Novosielski v. Wakefield*, (17 *Ves.* 417.) it may be inferred, that the usual time allowed to redeem, on a bill by the mortgagor to redeem, was six months after the debt was liquidated by the Master's Report; and a distinction was taken by the Chancellor, between a bill by the mortgagor to redeem, and a bill by the mortgagee to foreclose the equity of redemption. In the latter case, he admitted, that it was the practice, after giving the usual time of six months to redeem, in the decree of foreclosure, to *enlarge* the time, upon motion and upon terms. He said, he had found such a practice established by his predecessors, and he had followed it with considerable regret, as the effect was frequently a severe grievance to the mortgagee. The period to redeem, on a decree of foreclosure, has, in some cases, been several times enlarged from six months to six months, or from three months to three months, upon equitable terms, and under the special circumstances of the case. (*Anon.* 3. *Eq. Cas. Abr.* 605. n. 37. *Edwards v. Cunliffe*, 1 *Mad. Ch. Rep.* 287.) But in the case of a bill to redeem, the plaintiff professes to be ready with his money; and Lord *Eldon* would not enlarge the time for payment, and said there was no such practice.

I take it for granted, that the time to be allowed by the decree to pay the mortgage debt, whether on a bill to re-

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deem, or upon a bill to foreclose, is not absolutely certain, but rests in discretion, and will be regulated by the circumstances of the particular case. In the precedents in the *Equity Draftsman*, the time is left blank. But I am inclined to think, that six months is the usual time under the English practice, on bills to redeem; and there is the more reason for the allowance of such a liberal time, considering that the time will not afterwards be enlarged, and that a failure of payment by the time would, probably, be equivalent to a forfeiture of the equity of redemption. This was so understood by the counsel, in the case already cited from 17 Vesey. The usual decree, in these cases of bills to redeem, where the party fails to redeem, or is not entitled to redeem, is, that the bill be dismissed. (*Smith v. Valence*, 1 Rep. in Ch. 99. *Roscarick v. Burton*, 1 Ch. Cas. 217. *St. John v. Turner*, 2 Vern. 418. *Packington v. Barrow*, Proc. in Ch. 216. *Knowles v. Spence*, 1 Eq. Cas. Abr. 315. *Proctor v. Oates*, 2 Atk. 138. *Hartpole v. Walsh*, 4 Bro. P. C. 369. *Van Heythuysen's Eq. Draftsman*, 648. New-York edit.) Such a dismissal, I apprehend, amounts to a bar of the equity of redemption, because it might be pleaded in bar of a new bill to redeem.

A bill regularly dismissed upon the merits, where the matter has been passed upon, and there is no direction that the dismissal be without prejudice, may be pleaded in bar of a new bill for the same matter. This is the amount of the cases on the point. (*Prettyman v. Prettyman*, 1 Vern. 310. *Peterborough v. Germaine*, 1 Bro. P. C. 281. *Anon.* 1 Ch. Cas. 155. *Brandlyn v. Ord*, 1 Atk. 571. *Cater v. Dawar*, *Dickens*, 654.) There may, indeed, questions arise on this subject, as, whether the decree of dismissal has been duly enrolled, or duly and finally rendered, or whether it amounts to a *res judicata* upon the substance of the bill; but assuming these points of form and criticism to be all properly settled, it would seem to be within the reason of the rule, that a decree dismissing a bill seeking to redeem,



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because the plaintiff would not redeem when allowed and directed, should conclude the party from a new bill to redeem. Why should he be allowed to vex the mortgagee again with a faithless proposition? The maxim in the civil law would seem to be applicable to such a case—*bona fides non patitur ut bis idem exigatur*. A decision of Lord Macdeshfield, in *Jones v. Hendrick*, (*Bell's Supp. to Ves.* 381. vol. 2. 450., and 3 *Bro. P. C.* 315. old ed.) overruling a plea of an absolute decree of foreclosure, to a bill subsequently brought to redeem, does not seem to be reconcilable with principle. It would be better if we were permitted to read that case as Lord Hardwicke understood it, (3 *Ves.* 450.) who considered the plea to be bad, because there was no final and absolute order for foreclosure. On that ground, the decision overruling such a plea would be intelligible. It may be proper here to observe, that though six months, subject to enlargement, are allowed to redeem, on a bill to foreclose, yet the rule and the practice apply only to cases of strict foreclosure, where, by the decree, the equity of redemption is barred, and the complete title is vested in the mortgagee. The rule does not apply to cases of decrees for the sale of the mortgaged premises, according to our usual practice. The mortgagor, in such cases, is not subjected to a severe and absolute forfeiture of all his right, but he has the chance of the surplus moneys arising from the sale, and is placed upon the same footing of equality with debtors against whom judgments are rendered, and executions awarded at law.

In the present case, I have allowed to the plaintiff three months only, because the bill was not simply a bill to redeem. The main object of it was to set aside the mortgage, and it has led to a long and discouraging litigation of several years. The prayer to redeem was upon the condition that the plaintiffs failed in their principal purpose. In such a case, the mortgagee who comes out of the contest successfully has a just right to expect, and to demand

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\* *Ante*, p. 65.

prompt redemption. So, in the late case of *Brinckerhoff v. Lansing*,\* one object of the bill was to set aside the mortgage as satisfied, and kept on foot by fraud. The idea of redeeming it did not seem to have occurred to the plaintiffs. I, therefore, required prompt payment on the final decision, as the mortgagee had been detained, by a suit for years, from his remedy on the mortgage. In such cases, it is peculiarly incumbent on a mortgagor to be ready with his money. But where the bill is a plain simple bill to redeem, and there has been nothing unfavourable in the conduct of the mortgagor, I shall be disposed to follow the *English* practice in the allowance of time.

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#### KEISSELBRACK *against* LIVINGSTON.

Parol proof is admissible to correct a *mistake* in a written contract, in favour of the plaintiff, seeking a specific performance of that contract; especially, where the contract, in the first instance, is imperfect without referring to facts *aliunde*.

As, where there was an agreement to execute a lease for lives, "containing the usual clauses, restrictions, and reservations, contained in leases given by the defendant," it being necessary to resort to proof, *dehors* the agreement, to ascertain what were the usual clauses, &c. in such a lease; it was held to be open to the plaintiff, also, to show by *parol*, that it was agreed and understood, at the time, that a particular reservation was not to be inserted in the lease, which the defendant was to execute.

The statute of frauds does not apply to such a case.

Sept. 18th.

THE bill, which was filed December 15, 1814, stated, that on the 15th of February, 1803, the defendant (proprietor of the manor of *L.*) entered into an agreement, in writing, with *William Fritz*, to execute a lease to him of the farm on which he then lived, in great lot No. 3., in *L.*, for the

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lives of *W. F.* and his wife, and his son *A.* *W. F.* was to pay to the defendant 480 dollars and 37 cents, with interest, from the 1st of *May*, 1800, on the 1st of *May*, 1805, and the annual rent of twenty-two bushels of wheat; the lease to contain the usual clauses, restrictions, and reservations, in leases given by the defendant. *W. F.* covenanted to commit no waste, and not to assign before the agreement was fulfilled, without leave of the defendant in writing. *W. F.* remained in possession of the farm until the 28th of *April*, 1806, when he assigned the agreement, and all his interest therein, to the plaintiff, for 1,300 dollars. The plaintiff took possession under the agreement and assignment, and has ever since continued in possession of the farm. The plaintiff took the assignment in the presence, and with the approbation of the defendant, and has paid the rents reserved. The bill alleged that the defendant refused to execute a lease to the plaintiff, unless he would pay to him *one-fifth* of the purchase money, and agree to receive a lease containing a reservation of the same proportion of the purchase money on all future sales; whereas, it was agreed and understood by the parties, when the agreement was made between *W. F.* and the defendant, that the farm should not be subject to a fifth of the purchase money, or *quarter sales*; and that the plaintiff paid the whole consideration to *W. F.* That the defendant had brought an action of ejectment against the plaintiff. The bill prayed for an injunction, and for general relief, &c.

The material allegations in the bill were either admitted, or proved by the witnesses examined in the cause. The defendant, in his answer, referred to a printed form of leases given by him, annexed, (and which was tendered to the plaintiff, who refused to execute it,) containing a reservation of one fifth of the money arising on sales, &c., and denied any such parol agreement as stated in the bill; and insisted that, by the statute of frauds, he was not bound by any parol

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agreement contrary to the written contract, and claimed the benefit of the statute.

*Van Buren*, for the plaintiff.

*E. Williams*, contra.

THE CHANCELLOR. This a bill for the specific performance of an agreement in writing, to execute a lease for lives, "containing the usual clauses, restrictions and reservations contained in the leases given by the defendant." The agreement was made and executed in 1803, with *William Fritz*, who was in possession of the land, and continued thereon, until he assigned his right and interest, under that agreement, to the present plaintiff, in 1805, who took possession, with the knowledge and consent of the defendant, and has remained in possession ever since, and paid the rent down to 1813. The defendant, in *August*, 1814, offered to the plaintiff a lease with a provision in it, that upon every sale of the demised premises, one fifth of the purchase or consideration money, should be taken by the defendant to his own use. The bill states that such a lease was offered and refused, and charges that the parties agreed and declared, at the time of the execution of the agreement in writing, in 1803, that no such quarter or fifth sales should be demanded or paid.

The defendant does not, in direct and clear terms, deny any such agreement, that the farm should be exempt from quarter or other sales, but denies "any other or different contract than the one set forth." By *contract*, here he evidently means the agreement in writing; and he says, further, that the parol agreement is falsely charged, but it is not stated wherein, or to what extent; and as to the validity of any such agreement, he pleads the statute of frauds.

The only material point in this case is, whether the lease to be given, should or should not contain a reservation of

one fifth of the money on every sale, to the defendant, and his heirs and assigns.

The testimony taken in the cause establishes, beyond all doubt, the parol agreement as charged, and that the writing, if it requires a different construction and operation, has been so far drawn and executed in mistake. The three witnesses (*George Amaigh, William Fritz, and John Loomis*.) establish the fact most clearly, and I am not at liberty to discredit witnesses who are unimpeached. The only question is as to the competency of the proof.

The statute of frauds does not appear to me to have any bearing upon this case. The agreement for the three life lease, is in writing, and it has been partly performed by possession taken and transferred, and rent paid. The right of the plaintiff rests upon the contract in writing, and the only inquiry is, whether there is not a mistake in the generality of the expression, that the lease was to contain the "usual clauses," &c., and whether the parties did not intend an exception in respect to the quarter sales. There is no doubt of their declared intention to make such an exception, at the time the agreement was drawn; and I am induced to think that the writing is, and ought to be, susceptible of amendment and correction, in that particular. This is not an undertaking to supply a defective agreement by parol proof, or to construe it, by resorting to previous negotiations and conversations between the parties. It is making the writing speak what the parties intended it should speak, when they executed it; and I see no objection to the admission of parol proof in this case, that would not equally apply to every case of an attempt to correct, by parol proof, a mistake in a deed.

This is a peculiar case, in which parol proof is necessary, at all events, to give meaning and effect to that part of the writing which refers to the usage of the defendant, in drawing his leases. The reference is to a matter of fact, since what are *usual clauses* in his leases, must be shown by proof,

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*dehors* the instrument. The agreement was not, in the first instance, perfect, without reference to matters of fact, *abunde*. Parol proof is let in by the agreement itself, in order to settle the terms of the lease; and that being the case, there is less objection, in principle or policy, to carry the parol proof so far as to show what was the actual understanding of the parties, at the time, as to those terms. The Master of the Rolls stopped short of relief, in the case of *Woollam v. Hearn*, (7 Ves. 211.) where a mistake was alleged, because he said there was no precedent for allowing parol proof to correct a mistake, *in favour of a plaintiff*, seeking specific performance of an agreement. He admitted, however, that the proof before him made out the plaintiff's case, and that it would have been received as sufficient to refuse relief, if *the defendant* had sought a specific performance. I am not sufficiently instructed, at present, to admit the soundness of this distinction, which holds parol evidence admissible to correct a writing as *against*, but not *in favour* of a plaintiff, seeking specific performance of a contract. Lord *Hardwicke* does not appear to have been aware of any such distinction, in the two cases to which Sir *Wm. Grant* refers. Lord *Thurlow* rejected parol proof in the case of *Irnham v. Child*, (1 Bro. 92.) when offered by a plaintiff seeking performance of an agreement, and at the same time seeking to vary it by parol proof, but he went upon general grounds, applicable to such proof as coming from either party. And why should not the party aggrieved by a mistake in the agreement, have relief as well where he is plaintiff, as where he is defendant? It cannot make any difference in the reasonableness and justice of the remedy, whether the mistake was to the prejudice of one party or the other. If the Court has a competent jurisdiction to correct such mistakes, (and that is a point understood and settled,) the agreement when corrected, and made to speak the real sense of the parties, ought to be enforced, as well as any other agreement perfect in the first instance. It ought to

have the same efficacy, and be entitled to the same protection, when made accurate under the decree of the court, as when made accurate by the act of the parties. The one case illustrates the other—*res accendit lumina rebus*.

But without pursuing this point further, at present, it is sufficient to observe, that we are obliged, by the particular terms of this agreement, to deal with written and parol proof, to ascertain the clauses, and restrictions, and reservations that were intended. The written agreement rests for its consideration and performance, partly upon the aid of parol proof. And such proof being let in, by the contract itself, it may, upon the very principle admitted by the agreement, be applied to correct any mistake manifestly shown to exist in the general and unqualified terms of that part of the written agreement which depends for its explanation upon external proof.

I shall, accordingly, direct a specific performance of the agreement as corrected by the proof, and shall award costs, as was done by Lord Hardwicke, in *Bingham v. Bingham*, (1 Ves. 126.) in a decree correcting a mistake.

Decree accordingly.

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Costs awarded on a decree correcting a mistake in a contract, on a bill for that purpose, and for a specific performance.

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## OGDEN against GIBBONS.

The several acts of the Legislature of this state, granting and securing to *R. R. Livingston* and *R. Fulton*, the sole and exclusive right of using and navigating boats or vessels, by steam or fire, in the waters of this state, for a certain number of years, are constitutional and valid acts.

And this Court will grant an injunction to restrain the citizens of another state from navigating the waters of this state by vessels propelled by steam, without the consent of the said *R. R. L.* and *R. F.*, or their assigns, although such vessels may have been enrolled and licensed under the laws of the *United States*, as coasting vessels.

Sept. 27th,  
and Oct. 6th.

*AARON OGDEN* filed his bill, on the 21st of October, 1818, against *Thomas Gibbons*, stating, that on the 19th of March, 1817, the Legislature granted to *John Fitch*, the exclusive right of using, for a limited time, a steam boat, &c. That on the 2<sup>nd</sup> of March, 1798, the Legislature repealed the act so made in favour of *Fitch* and passed an act granting a similar right to *Robert R. Livingston*, for twenty years; and on the 5th of April, 1803, granted the like right to *Robert R. Livingston*, and *Robert Fulton*, for twenty years. That on the 6th of April, 1807, the Legislature passed another act in favour of *L.* and *F.*, extending the time for giving the proof required by the former act. That on the 11th of April, 1808, *L.* and *F.* having given the requisite proof of their having built a boat impelled by steam, at the rate of more than four miles an hour, &c. the Legislature passed another act, giving to *L.* and *F.*, and their associates, an extension of five years of the exclusive right to navigate the waters of this state, by boats or vessels moved by steam, for every additional boat which they might build, so that the whole term should not exceed thirty years from the time of passing that act; and declaring, that no

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person or persons, without their licenses, should set in motion, or navigate, upon the waters of this state, or within the jurisdiction thereof, any boat or vessel moved by steam or fire, under the penalty of forfeiting to the said *L. and F.*, and their associates, such boat or vessel, &c. That by another act, passed the 9th of *April*, 1811, it was declared, among other things, that the several forfeitures mentioned in the act of the 11th of *April*, 1808, should be deemed to accrue on the day on which any boat moved by steam or fire, not navigating under the license to *L. and F.*, or their associates, shall navigate any of the waters of this state, or those within its jurisdiction, in contravention of the said act, and that *L. and F.*, and their associates, might thereupon have the same remedy, in law and equity, to recover such boats, &c. as if the same had been wrongfully taken out of their possession, &c. The bill further stated, that the said *L. and F.* having, in all things, complied with, and fulfilled the terms and conditions expressed in the said laws, became entitled to the exclusive right and privilege to navigate the waters of this state, by boats moved by steam or fire. That on the 20th of *August*, 1809, *R. R. L. and F.*, by indenture, granted to *John R. Livingston*, and his assigns, "all the right which the said *R. R. L. and F.* possessed under the laws of the state, exclusively to navigate from any place within the city of *New-York*, lying to the south of the state prison, to certain places in the said indenture specified, and lying to the south of *Powles Hook ferry*, and particularly to *Staten Island*, *Elizabethtown Point*, *Perth and South Amboy*, and the river *Rariton* up to *New-Brunswick*, &c. That on the 5th of *May*, 1815, *J. R. L.*, by articles of agreement, agreed to permit the plaintiff to run a steam boat, or steam boats, between *Elizabethtown Point* and the city of *New-York*, for ten years, from the 1st of *March*, 1815, in as full and ample a manner as he, the said *J. R. L.*, had then a right to run the same, by virtue of the grant to him from *R. R. L. and R. F.*; and that the said *J. R. L.*

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further agreed with the plaintiff, that he would not run, nor grant any license to run a boat, or boats, during the ten years, to and from *Elizabethtown*, and *Elizabethtown Point*. That *R. R. L.* died in *February*, 1813, and *R. F.*, in *March*, 1815, and that the legal representatives of *R. R. L.* and *R. F.*, on the 29th of *December*, 1815, covenanted with the plaintiff and *Thomas Morris*, among other things, to release and confirm to the present owners, or their assigns, of any steam boat, or boats, run by them, or any of them, on the *Hudson* river, on the sound between *New-York Island* and *Long Island*, or between *New-York* and *Elizabethtown Point*, or *Elizabethtown*, to the whole extent of the township, all their right, title, or titles respectively, to every patent, or other right holden by them, &c. That when this last mentioned deed was executed, the plaintiff was owner of a steam boat then running on the waters of the state, between *New-York* and *Elizabethtown Point*, or *Elizabethtown*; and the plaintiff claimed the exclusive right of navigating the waters of the state of *New-York*, by boats moved by steam or fire, between *New-York* and *Elizabethtown*, in virtue of the two deeds last mentioned. That the plaintiff has lately built, and runs a steam boat called the *Atalanta*, by virtue of his said exclusive right, between *Elizabethtown Point* and the city of *New-York*. That the defendant, *T. Gibbons*, of *Elizabethtown*, in the state of *New-Jersey*, is owner of two boats impelled by steam, one called the *Stoudinger*, and the other the *Bellona*; and in contravention of the exclusive right and privilege of the plaintiff, and without any license from the plaintiff, or *R. R. L.* and *R. L.*, or their representatives, the defendant had set in motion the said two boats moved by steam or fire, and employed them in the transportation of passengers between the city of *New-York* and *Elizabethtown*, and that those boats now actually navigate between *New-York* and *Elizabethtown*, &c. to the great loss and prejudice of the plaintiff. *Prayer for an injunction to restrain the defendant,*

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his agents, &c. from using, employing, and navigating the said two steam boats, or either of them, or any other steam boat by him purchased or built, as aforesaid, on the waters of this state lying between *Elizabethtown*, or any place within the bounds of the township, and the city of *New-York*, &c. A writ of injunction was granted on the 21st of *October*, 1818, according to the prayer of the bill.

On the 19th of *August*, 1819, the defendant filed his answer to the bill, in which he admitted the several acts of the Legislature, and the deeds, &c. set forth in the plaintiff's bill, but denied the exclusive right claimed by the plaintiff under them. He admitted, that he was the owner of the two steam boats described in the bill, and which were intended to navigate by steam between the city of *New-York*, and the wharf of the defendant in *New-Jersey*, at a place usually called *Halsted's Point*, which is within the bounds of the townships of *Elizabethtown*, but separated from *Elizabethtown Point*, by a large and navigable creek; that the said boats did run between *New-York* and the said wharf of the defendant, which is a short distance from *Elizabethtown Point*, the place from which the plaintiff's boat runs to *New-York*; and that the said boats of the defendant continued so to run, &c. until restrained by the injunction issued in this cause. But he denied, that the said boats ever ran from *Elizabethtown Point*. The defendant averred, that his two boats are vessels above the burthen of twenty tons, and were duly enrolled and licensed under the laws of the *United States*, to be employed in carrying on the coasting trade, according to the laws of the *United States*. That the *Stoudinger* was enrolled at *Perth Amboy*, in *New-Jersey*, on the 23d of *October*, 1817, and licensed for one year, which license was renewed on the 20th of *October*, 1818, for one year, by the collector of the port of *Perth Amboy*, in the form prescribed by law, in pursuance of an act of Congress, entitled, "an act for enrolling and licensing ships and vessels to be employed in the coasting trade and fish-

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ries, and for regulating the same." And the defendant insisted, that the *Stoudinger*, under this license, may be lawfully employed and navigated in the coasting trade between parts of the same state, or of different states, and cannot be excluded or restricted therein, by any law or grant of any particular state, on any pretence to an exclusive right to navigate the waters of any particular state by steam boats, &c. That the steam boat *Bellona* was in like manner enrolled and licensed on the 20th of *October*, 1818, &c. That the representatives of *R. R. L.* and *F.*, claiming to be entitled to certain patent rights for improvements in steam navigation, and, also, an exclusive right to navigate the waters of the state of *New-York*, with boats or vessels propelled by steam or fire, on the 14th of *September*, 1816, by deed, sold to *D. D. Tompkins*, *Adam Brown*, and *Noah Brown*, and their assigns, "the right, liberty, and privilege of navigating, for all purposes whatsoever, boats or vessels of all kinds whatsoever propelled by the force of fire or steam, upon, over, and across the waters of the bay of *New-York*, *Staten Island* sound, the outward harbour, including *Prince's* and *Gravesend* bays, and a part of the *Atlantic* ocean, and *Jamaica* bay; and, also, a right, privilege, and liberty, with all such boats so propelled, to touch, stop, and land passengers, and discharge cargoes, to depart from, and arrive at the city of *New-York*, or any part thereof; and, also, the sole and exclusive right, privilege, and liberty of navigating, with all such boats to and from the city of *New-York*, and to and from the points and places in the said deed particularly mentioned and specified, to wit: "*Shrewsbury* bay and rivers in *New-Jersey*, *Sandy Hook*, *Spermaceti Cove*, and the waters and shores adjacent thereto, to the southward of *Sandy Hook*, *Fort Diamond*, and the shores of *Long Island*, with liberty to touch at any point or place on the easterly and southerly side of *Staten Island*, and any point on the said shores, at which the grantors may lawfully touch, consistently with their grants to others." That *Adam*

*Brown* afterwards died, and his executors, on the 4th of *December*, 1808, by a deed, reciting, that all the rights and privileges under the last mentioned deed, had been released to *D. D. Tompkins*, and as respected *Shrewsbury*, and all the shores of *Shrewsbury* bay and rivers, to *Noah Brown*; and they, the said executors of *A. B.*, sold to the defendant and his assigns, all the rest, residue, and remainder of the right of *A. B.*, derived under the said deed of the 14th of *September*, 1816. That *D. D. Tompkins* and *Noah Brown*, on the 7th of *December*, 1818, by deed, sold and conveyed to the defendant, a right of navigating with steam boats, upon, over, and across the waters of the bay of *New-York*, *Staten Island* sound, the outward harbour, the *Atlantic ocean*, and all the waters specified in the deed of the representatives of *R. R. L.* and *F.* to them, and to touch and land passengers, and take or discharge cargoes, and to depart from, and arrive at, and navigate to, from, and between the city of *New-York*, or any part thereof, and to, from, and between any place or places, point or points whatsoever, in the state of *New-York*, or in the state of *New-Jersey*, or elsewhere, other than, and except *Staten Island*, and all the points and places on the shores of the state of *New-Jersey*, between the point of *Sandy Hook* and the east end of the division line between *Monmouth* and *Middlesex* counties, in the state of *New-Jersey*." And the defendant insisted, that if *R. R. L.* and *F.*, or either of them, had any exclusive right to navigate by steam boats, (which, however, the defendant did not admit,) he, the defendant, had a right, under the deeds above mentioned, to navigate the waters of the state of *New-York*, between the city of *New-York* and *Elizabethtown*, or *Elizabethtown Point*, or any place or point in the creek called *Elizabethtown* creek, in the township of *Elizabethtown*, in the state of *New-Jersey*, with boats or vessels moved by steam or fire. And the defendant denied the right of the plaintiff, if the matters set forth in his bill were true, to prosecute alone, as by his own showing, he was as-

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signed of a *part* only of the exclusive right claimed by him; and he prayed that he might have the benefit of this defence, equally as if he had demurred to the bill, or pleaded it.

Sept. 27th.

On the coming in of the answer, a motion was, this day, made to dissolve the injunction, which was argued by *Henry*, for the defendant; and by the plaintiff himself, and *Van Vechten*.

Oct. 6th.

The cause stood for consideration until this day.

**THE CHANCELLOR.** The motion to dissolve the injunction is founded upon the matter contained in the answer.

The defendant sets up two grounds of right to navigate with steam boats between the city of *New-York* and *Hobbs's Point*, within the township of *Elizabethtown*, in *New-Jersey*: (1) A license to carry on the coasting trade, granted under the laws of the *United States*, and (2) a license under the representatives of *Livingston* and *Fulton*.

1. The act of Congress (passed 18th of February, 1793, ch. 8.) referred to in the answer, provides for the enrolling and licensing ships and vessels to be employed in the coasting trade and fisheries. Without being enrolled and licensed, they are not entitled to the privileges of *American* vessels, but must pay the same fees and tonnage as foreign vessels, and if they have on board articles of foreign growth or manufacture, or distilled spirits, they are liable to forfeiture. I do not perceive that this act confers any right incompatible with an exclusive right in *Livingston* and *Fulton*, to navigate steam boats upon the waters of this state; the right of the Legislature to pass the laws mentioned in the pleadings is not attempted to be made a question of in this place, and upon this occasion. That right has been settled (as far as the Courts of this state can settle it) by the decision of the Court of Errors, in *Livingston v. Van Ingen*; (9 Johnson, 507.)

and if these laws are to be deemed, in the first instance, and *per se*, valid and constitutional, and as conferring valid legal rights, a coasting license cannot surely have any effect in controlling their operation. The act of Congress referred to, never meant to determine the right of property, or the use or enjoyment of it, under the laws of the states. Any person, in the assumed character of owner, may obtain the enrolment and license required; but it will still remain for the laws and courts of the several states to determine the right and title of such assumed owner, or of some other person, to navigate the vessel. The license only gives to the vessel an *American* character, while the right of the individual procuring the license to use the vessel, as against another individual setting up a distinct and exclusive right, remains precisely as it did before. It is neither enlarged nor diminished by means of the license; the act of the collector does not decide the right of property. He has no jurisdiction over such a question. Nor do I think it would alter the case, in respect to the force and effect of the laws before us, if the license of the collector was evidence of property. However unquestionable the right and title to a specific chattel may be, *and from whatever source that title may be derived*, the use and employment of it must, as a general rule, be subject to the laws and regulations of the state. If an individual be, for instance, in possession of any duly patented vehicle, or machine, or vessel, or medicine, or book, must not such property be held, used, and enjoyed, subject to the general laws of the land, such as laws establishing turnpike roads and toll bridges, or the exclusive right to a ferry, or laws for preventing and removing nuisances? Must it not be subject to all other regulations touching the use and employment of property, which the Legislature of the state may deem just and expedient? It appears to me that these questions must be answered in the affirmative. The only limitation upon such a general discretion and power of control, is the occurrence of the case

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*Garrison.*

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when the exercise of it would impede or defeat the operation of some lawful measure, or be absolutely repugnant to some constitutional law of the Union. When laws become repugnant to each other, the supreme or paramount law must and will prevail. There can be no doubt of the fitness and necessity of this result, in every mind that entertains a just sense of its duty and loyalty. Suppose there was a provision in the act of Congress, that all vessels duly licensed, should be at liberty to navigate, for the purpose of trade and commerce, over all the navigable bays, harbours, rivers, and lakes within the several states, any law of the states, creating particular privileges as to any particular class of vessels, to the contrary notwithstanding; the only question that could arise in such a case, would be, whether the law was constitutional. If that was to be granted or decided in favour of the validity of the law, it would certainly, in all Courts and places, overrule and set aside the state grant. But, at present, we have no such case, and there is no ground to infer any such supremacy or intention, from the act regulating the coasting trade. There is no collision between the act of Congress and the acts of this state, creating the steam boat monopoly. The one requires all vessels to be licensed, to entitle them to the privileges of *American vessels*, and the others confer on particular individuals, the exclusive right to navigate steam boats, without, however, interfering with, or questioning the requisitions of the license. The license is admitted to be as essential to these boats as to any others. The only question is, who is entitled to take and enjoy the license? The suggestion that the laws of the two Governments are repugnant to each other upon this point, appears to be new, and without any foundation. The acts granting exclusive privileges to *Livingston* and *Fulton*, were all passed subsequent to the act of Congress; and it must have struck every one, at the time, to have been perfectly idle to pass such laws, conferring such privileges, if a coasting license, which was to be obtained as a matter of



course, and with as much facility as the flag of the *United States* could be procured and hoisted, was sufficient to interpose and annihilate the force and authority of those laws. If the state laws were not absolutely null and void from the beginning, they require a greater power than a simple coasting license, to disarm them. We must be permitted to require, at least, the presence and clear manifestation of some constitutional law, or some judicial decision of the supreme power of the Union, acting upon those laws, in direct collision and conflict, before we can retire from the support and defence of them. We must be satisfied that

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*Neptunus muros, magnoque emota tridenti  
Fundamenta quatit.*

2. If the defendant has any right to navigate his steam boats upon the waters of the state, he must have derived it under the representatives of *Livingston* and *Fulton*. But the grant he sets up was subsequent to the deed from *L. and F.* to *John R. Livingston*, under whom the plaintiff holds his title; and if the pretensions of the plaintiff under that deed are well founded, the defendant fails in his defence.

The deed to *John R. Livingston*, conveys "all the right which *L. and F.* possessed, exclusively to navigate with steam boats from the city of *New-York*, south of the state prison to *Staten Island*, *Elizabethtown Point*, *Perth* and *South Amboy*, and the river *Rariton* up to *New-Brunswick*." The defendant says, that *Halsted's Point* (between which and the city of *New-York*, his boats navigate) is "within the township of *Elizabethtown*, but separated from *Elizabethtown Point*, by a large and navigable creek." "That his wharf, at *Halsted's Point*, is within a short distance of *Elizabethtown Point*," and yet he denies that he is sailing within the limits of the grant to *J. R. L.* Whoever is acquainted with the position of the land and waters at and adjoining

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*Elizabethtown Point*, or will cast his eye upon a map of that country, will at once perceive, that upon the defendant's construction of the deed of *J. R. L.*, the grant to him was vain and illusory, as a beneficial exclusive privilege. If *E.* and *F.*, notwithstanding that deed, retained in themselves the right to run steam boats to and from *Elizabethtown* and *New-York*, by starting from the opposite side of the small creek that runs, at *Elizabethtown Point*, into the bay or sound; the right in *J. R. L.* was, in effect, no longer exclusive, but common. This is certainly not the sound construction of the deed, which gave him the right to navigate exclusively within its prescribed limits. It is to be so construed as to have value and effect, as an exclusive right. For this purpose, *Elizabethtown Point* must be considered as including the whole shore or navigable part of *Elizabethtown*; and this appears to be the clear and necessary interpretation of the grant, when we take into consideration the situation of the ground and waters, and the nature and object of the grant. Any narrower construction in favour of the grantors would render the deed a fraud upon the grantee. It would be like granting an exclusive right of ferriage between two given points, and then setting up a rival ferry within a few rods of those very points, and within the same course and line of travel. The common law contained principles applicable to this very case, dictated by a sounder judgment and a more enlightened morality. If one had a ferry by prescription, and another erected a ferry so near it as to draw away its custom, it was a nuisance, for which the injured party had his remedy by action. (*Bro. action sur le case*, pl. 57. tit. *Nuisance*, pl. 12. 2 *Roll. Abr.* 140. pl. 20. 3 *Black. Com.* 219.) The same law and remedy were applied to the case of a fair or market, in which an individual had a freehold interest, if another fair or market was erected, and used, within its vicinity. (*F. N. B.* 184. and notes. 2 *Roll. Abr.* 140. pl. 1, 2, 3. *Yard v. Ford*, 2 *Saund.* 172.) The same rule applies, in its spirit and substance, to

all exclusive grants and monopolies. The grant must be so construed as to give it due effect, by excluding all contiguous and injurious competition.

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v.  
GIBSON.

The grant of an exclusive right to run steam boats between *New-York* and *Elizabethtown Point*, was intended to comprehend the entire benefit of all the travelling, and passengers going to and from *Elizabethtown* and *New-York*. It meant to embrace the whole stream of intercourse between these two places, and *Elizabethtown Point* was used for the landing place of the town. No other landing place occurred to the parties, or it, doubtless, would have been inserted. The intention of the instrument is clear and palpable. It is to be deduced from the general description, and the nature of the grant as an exclusive privilege, and the particular locality of the land and waters in question. Any other construction is unreasonable, and incompatible with the object of the grant, and with the principles of the common law applicable to the case. An exclusive right to navigate with steam boats between the city of *New-York* and *Elizabethtown Point*, includes in it the use of the waters on the usual passage between those termini, in exclusion of the use of those waters on such a passage or route, by any other steam boat. It is like the grant of an exclusive right of way, and no stranger has a right to use it. (*Finch's Law*, 31.)

In the subsequent grant from *J. R. L.* to the plaintiff, the existence of his right under the deed of 1808, to the entire navigation between *New-York* and *Elizabethtown*, as well as *Elizabethtown Point*, was assumed. It was also provided, that an exclusive grant to navigate to the latter place, should exclude any interfering navigation to the other. There was an interval of seven years between the deed of 1808 and this latter deed, in all which time we are led to infer that *J. R. L.* had enjoyed the exclusive right under his deed, to the extent now set up by the plaintiff, and

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that both parties to the deed of 1808 had given it that practical construction. But if the deed of 1808 was liable to doubt and difficulty upon this point, the sense of the parties was more explicitly declared in the deed of the 29th of *December*, 1815, which was also prior to any deed under which the defendant sets up a right. This last deed was from the representatives of *L.* and *F.* to the plaintiff, and *T. M.*; it was a covenant with them to release and confirm to the owners of any steam boat owned and run on the *Hudson* river, or on the sound between *New-York* and *Long Island*, or between *New-York* and *Elizabethtown Point*, or *Elizabethtown*, to the whole extent of the township, all the right and title which they then held. The plaintiff was, at the time, owner of a steam boat running between *Elizabethtown Point* and *New-York*, and there was then no other subsisting grant under *L.* and *F.*, relative to a navigation between *New-York* and *Elizabethtown*, or any part of it, but the one to *J. R. L.* The covenant to release and confirm, in respect to those waters, applied to that grant, and to none other; and when the representatives of *L.* and *F.* speak of running between "*New-York* and *Elizabethtown Point*, or *Elizabethtown*, to the whole extent of the township," they give a construction to the former deed, and recognize a right out of them, to the reasonable and just extent which the grant imported. They must have considered the right under *J. R. L.* in that broad extent, as then subsisting and held, or they would not have used such pointed and strong description, when speaking of that right. The expression was evidently intended to be *declaratory* of the meaning and operation of the former deed. The words have no sense, or meaning, or application, in any other view; and neither the representatives of *L.* and *F.*, nor those claiming under them, can now be permitted to put a narrower construction upon their former grant, and especially a construction injurious, if not repugnant to its end and design, as the grant of an exclusive privilege.

It is, however, an act of justice to those representatives, to observe, that no subsequent attempt appears on their part, to defeat or impair the right previously granted.

The defendant sets up a right to navigate steam boats between *Elizabethtown* and *Halsted's Point* and *New-York*, derived under the deed from the representatives of *L. and F.* of the 14th of *September*, 1816, to *Daniel D. Tompkins* and *Adam* and *Noah Brown*. The extent of this grant is partly described in the defendant's answer, and partly given by a reference to the deed. It was "the right of navigating, for all purposes whatsoever, steam boats upon, over, and across the waters of the bay of *New-York*, *Staten Island* sound, the outward harbour, including *Prince's* and *Gravesend* bays, a part of the *Atlantic* shore, and *Jamaica* bay, &c. And, also, the right to stop and land passengers, and discharge cargoes, at the city of *New-York*, and the sole and exclusive right of navigating with steam boats to and from the city of *New-York*, to and from *Shrewsbury* bay and rivers in the state of *New-Jersey*, *Sandy Hook*, *Spermaceti Cove*, and the shores and waters adjacent thereto, lying within, and to the southward of *Sandy Hook*, *Fort Diamond*, and the shores of *Long Island*, from *Denise's* heights inclusive, southerly along *Gravesend* bay, &c. And the sole and exclusive right of touching at any point, on the easterly and southerly side of *Staten Island*, and any point or place on the said shores, at which the parties of the first part may now stop or touch, consistently with the rights heretofore granted." This deed was not intended to interfere with the former grant to *J. R. L.*, and the only part of it that looks like an interference, is in the expression *Staten Island* sound. But we find, afterwards, in the deed, that expression explained by the liberty given (though very cautiously, and at the risk of the grantees) to stop and touch at any part on the *easterly and southerly side of Staten Island*. There is no liberty to stop or touch, or deliver or receive passengers or freight, at any port or place in *Staten*

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*Island sound* There is no privilege granted to navigate between *New-York* and *Elizabethtown*, or to touch, or receive, or land passengers; and every assumption of such right, as derived from and under that deed, is manifestly groundless. If any right be given to navigate on the route to that place from *New-York*, it is only a water passage through *Staten Island sound*; and every act in carrying passengers, as between *New-York* and *Elizabethtown*, under colour of that deed, is a trespass upon the rights of the grantors, or their lawful assignees.

If the grantees in that deed had no such right, they had none to impart to others, and it becomes unnecessary to examine into the legal import and operation of the subsequent deeds from those grantees to the defendant.

There was an objection raised in the answer, to the not making of *Thomas Morris* a party, because his name is mentioned in the deed of the 29th of *December, 1815*. But as it is no where averred, nor does it appear, that *Mr. Morris* was the owner of any boat to which the covenant in that deed applied, he had no interest in this cause, and there was no need to make him a party.

Every branch of the right and title set up in the answer, as matter of defence, appearing to be without support or solidity, the motion to dissolve the injunction is, consequently, denied. As the injunction was, however, granted before the decision on the 3d of *May* last, in the cause of *Livingston v. Ogden and Gibbons*,\* it might, perhaps, be more extensive than the doctrine laid down in that decision would warrant. I shall, therefore, so modify or explain the operation of the injunction, as to confine it to the whole of the waters in the bay of *New-York*, on the passage or route between the city of *New-York* and *Elizabethtown Point* or *Elizabethtown*, or any part thereof, and not apply it to the waters of the Sound that lie between *Staten Island* and the state of *New-Jersey*, so long as the boats of the defend-

\* *Ante*, p. 48.

ant do not leave the Sound, on their passage to the city of  
*New-York.*

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Order accordingly.(a)

ROCKWELL  
v.  
FOLSON.

(a) On appeal, this decretal order was unanimously affirmed, by the Court for the Correction of Errors, April 27th, 1820. Vide 17 Johns. Rep. 488—510. S. C.

ROCKWELL against FOLSON.

Where a witness is about to depart the state, permanently to reside abroad, the Court, on petition verified by affidavit, and motion for that purpose, will order him to be examined, *de bene esse*, without previous notice of the motion.

ON the petition of the plaintiff, verified by the affidavit of his solicitor, in his absence, that R. S. was a material witness for him in the cause, and that he was about to depart in a few days for the *Alabama* territory, and to reside there permanently; Henry moved that the plaintiff be at liberty to examine the witness, *de bene esse*. He referred to the case of *Fort v. Ragussin*, (2 Johns. Ch. Rep. 146.) and stated, that notice of the motion could not well be given in this case; and that it was unnecessary, as a copy of the interrogatories must be previously served upon the defendant, according to the 68th rule of this Court.

Oct. 7th.

*Per Curiam.* Motion granted.

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COOK  
v.  
MANCIUS.

COOK & KANE *against* MANCIUS & VISSCHER.

Where the defendants pleaded certain outstanding judgments, and the Court gave leave to the plaintiff to amend their bill, by making the judgment creditors parties; and, subsequent to the order, the judgments were satisfied and discharged, and the plaintiffs, instead of amending their bill, replied, taking issue on the plea: the Court *ordered* the plaintiffs to pay the costs of the plea and of the subsequent proceedings, in thirty days, or that the bill stand dismissed, with costs; but if the costs were so paid, then the defendants to answer the bill in *six weeks*, or that it be taken *pro confesso*.

Oct. 1844.

THE defendants pleaded in bar certain outstanding judgments, and that those creditors ought to have been made parties to the suit.

The plaintiffs, instead of amending their bill, by making those creditors parties, upon the terms directed by the Chancellor, (*vide* S. C. v. 3. p. 427.) traversed the plea, by replying and taking issue upon it, and putting the defendant to prove it.

The cause came on to be heard upon the proofs taken under that issue.

*W. A. Duer*, for the plaintiffs.

*J. V. N. Yates*, contra.

THE CHANCELLOR held, that the testimony very clearly established the truth of the plea at the time it was filed, and the issue was to be considered as referring to *that period*. It appeared, that the judgments had been discharged, and satisfied subsequent to that period. It was thereupon *ordered*, that the plaintiffs, within thirty days, pay the costs of the plea, and of all subsequent proceedings, or that the bill



stand dismissed, with costs; and that if the costs were to be paid, that the defendants should then answer the bill, within six weeks, or that the bill be taken *pro confesso* against them.

1610;

STRONG  
v.  
STEWART.

STRONG and others, Trustees of MITCHELL, against  
STEWART.

Parol evidence is admissible to show that a mortgage only was intended, and not an absolute sale, and that the defendant had fraudulently attempted to convert the loan into a sale.

And, in such case, the plaintiff was held entitled to redeem.

BILL to redeem mortgaged premises. The defendant set up an absolute sale, by an assignment, absolute in terms, of the right of *Mitchell* in the land, and denied the fact of a loan. But the defendant, at the same time, admitted in his answer, that after the assignment was executed, he gave *Mitchell*, at his request, time to return the money, and take back the assignment.

Oct. 18th.

Parol proof was taken, which established, conclusively, the fact of a loan, and not a purchase and sale; and that the assignment was made, given and received, by way of security for a loan.

*J. Kirkland*, for the plaintiffs.

*N. Williams*, contra.

THE CHANCELLOR. On the strength of the authorities, and on the proof of the loan, and of the fraud, on the part of the defendant, in attempting to convert a mortgage into an absolute sale, I shall decree an existing right in the

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v.  
MARKLE.

plaintiffs to redeem. The cases of *Osterell v. Purchase*, (*Cases temp. Talbot*, 61.) *Muswell v. Molinsdale*, (*Pres. in Chancery*, 526.) *Washburn v. Merrill*, (1 *Day's Cases in Error*, 139.) and the acknowledged doctrine, in 2 *Atk.* 99. 258. 3 *Atk.* 389; and 1 *Powell on Mortg.* 104. (4th London edit.) are sufficient to show, that parol evidence is admissible in such cases, to prove that a mortgage was intended, and not an absolute sale, and that the party had fraudulently perverted the loan into a sale. In this case, the admissions in the answer were sufficient to presume a mortgage, against the absolute terms of the assignment.

Decree accordingly.

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MARKLE against MARKLE and others.

A female defendant, unmarried, above sixty years of age, and who had been deaf and dumb from her infancy, was admitted to appear and defend by guardian.

Oct. 26th.

PETITION of the defendant, *Jacob Markle*, stating that *Debra Markle*, one of the defendants, and who is his sister, and unmarried, is of the age of sixty years, and has been deaf and dumb from her infancy, and is of such imbecility of mind as to be incapable of defending the suit. These facts were verified by affidavit.

*Ford*, for the defendant, moved that a guardian be appointed to appear and put in her answer, and defend the suit.

*Per Curiam*. Motion granted. Cases to this effect were referred to in 2 *Johnson's Ch. Rep.* 235.

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MATTER OF  
FOLGER.

## In the Matter of FOLGER, a Lunatic.

Where, on the petition of a relation of a lunatic, and who had received from him a deed of a farm, a few days before the finding of the inquisition of lunacy, an issue was awarded to try the fact of lunacy, and the party, on the trial, was found to have been a lunatic for several years preceding; the party traversing the inquisition was ordered to pay the costs.

PETITION of Aaron Folger, committee of the estate of the lunatic, stating that he was appointed committee in August, 1818. That in the autumn of 1818, on the petition of Thomas Folger, stating that he was grantee of a farm of the lunatic, by deed, dated a few days before the inquisition had been found, an issue was awarded to try the question of lunacy. That to expedite the business, the petitioner applied to have the issue tried at the Rensselaer circuit. That Thomas Folger interposed a number of affidavits to prevent it, and succeeded. That the issue was to be tried at the Washington circuit, and the petitioner attended with twenty-three witnesses, but there was not time to try the issue at that Court. That the trial of the issue was then ordered for the Rensselaer circuit, and the lunatic was found to have been *non compos*, for several years prior to the trial. Prayer, that the said Thomas Folger may be ordered to pay the taxable costs attending the trial of the issue.

Nov. 12th.

L. Mitchell, in support of the petition.

THE CHANCELLOR. In the case *ex parte Ward*, (6 Ves. 579.) a groundless petition by a stranger, for a traverse, was dismissed with costs. So, where the heir filed a bill to set aside a will, on the ground of the testator's insanity,

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LUCE  
v.  
GRAHAM.

and failed, he was ordered by Lord *Hardwicke*, in *Webb v. Claverden*, (2 *Atk.* 423.) to pay costs. It would appear, from the case of *White v. Wilson*, (13 *Ves.* 87.) that when the heir demands an issue to try the testator's sanity, and fails, he will be ordered to pay costs, if he sets up insanity as a pretext. The question of costs is discretionary, and depends upon the character of the application, and the conduct of the party.

In the present case a relation of the lunatic had procured a deed from him, while a lunatic, and his interest in establishing that deed, and not concern or humanity for the lunatic, was, probably, the motive for the traverse of the inquisition. He was struggling for his own advantage; and it is just and reasonable that he should pay the costs to which he has, without just ground, and in furtherance of his claim, subjected the estate of the lunatic.

Ordered, that *T. F.* pay the costs to be levied<sup>+</sup> within twenty days, &c.

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LUCE against E. and C. M. GRAHAM.

Though a rule to *amend* a bill, is of course, yet it must be actually entered with the *Register*; for the clerks cannot allow the records to be amended without a certified order for that purpose.

The *amendments* should be marked and distinguished, that they may be easily seen by the defendant, and without being blended with, or repeating the original bill.

Nov. 26th.

ON the 23d of *August*, 1819, the plaintiff, on an *ex parte* application, without notice, obtained an order, "that the defendants answer the amended bill, with the exceptions, in this cause, in four weeks after the service of a copy of this

+ Taxed

order, or show cause why an attachment should not issue against them.”

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LUCK  
V.  
GRAHAM.

*Riggs*, for the defendants, now showed cause :

1. That an order to amend the bill was never entered with the assistant register, and the clerk of the court considered the amendments (which were engrafted into a re-engrossed copy of the bill) as irregularly placed in his office, without an order :

2. The amended bill prays process against the defendants, which is not the usual course, and is improper, as it treats the defendants as being out of court, so that their former answers cannot be used in their defence. (1 *Vesey jun.* 250. 4 *Ves.* 66.) It is not necessary to serve a new subpoena upon an amended bill.

3. The manner of making the amendments was improper, and renders the records of the court confused and inconsistent. It is extremely difficult to point out distinctly what is original, and what is new matter, and how much of the original bill is retained, and how much left out. There ought to have been such an arrangement and designation of the original matter, and of the amendments, as to enable the opposite party clearly and readily to discern them. (2 *Atk.* 109. 11 *Ves.* 578.)

It appeared that the original bill was filed *July 17, 1818*, and the amended bill *July 22d, 1819*. The latter appeared, in every respect, to be a new and original bill, and no part of the matter therein, is stated to be by way of amendment.

The defendants answered the exceptions taken to their original answer, but did not take any notice of the amended bill, for the reasons above mentioned.

*H. and R. Sedgwick*, contra. They cited 2 *Johns. Ch. Rep.* 228.

The plaintiff, also, at the same time with the discussion on the above rule to show cause, moved, on notice and

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affidavit, for an attachment against the defendants, for not answering the exceptions, and for a sequestration of the personal estate, and of the rents and profits of the real estate of the defendant *Edward Graham*, who resides in *North Carolina*.

THE CHANCELLOR. The defendants have shown sufficient cause against the attachment.

1. Though the rule to amend the bill might have been entered, as of course; yet a rule must be entered for the purpose. The clerks are not to permit the pleadings on file to be amended, without the production of an order certified by the Register, or assistant Register. The reason of the practice speaks for itself. There would be no security or certainty in the records of the court, and the clerk would not be able to interpose any control or check to irregular and improper interference with the pleadings, if the solicitor could come and alter them, at his pleasure. The *English* practice requires an order for the amendment, in cases like this, regularly drawn and entered. This appears from the case of *Partridge v. Haycraft*, (11 *Ves.* 577.)

2. The good sense of the thing obviously requires, that the amendments should be distinctly shown, so that they may be easily perceived. They are either to be made by interlineations, or by insertions in the margin, if short, or by being separately engrossed and annexed to the original bill. If the amendments be of such a nature as to require the original bill to be re-engrossed, they must then be designated in some way sufficient to point them out to the defendant. In *Willis v. Evans*, (2 *Ball. & Beatty*, 225.) Lord Chancellor *Manners* observed, that "the rule with respect to amended bills was, that if there be not much new matter to be introduced, it is done by interpolation; if much, it must be done on another engrossment, to be annexed to the bill, in order to preserve the record from being defaced." He said, that if the party filed an amended bill, he might refer to the

allegations in the original bill, without repeating them. He held himself bound to look, with great jealousy, that the suiters of the court be not put to any unnecessary expence, and that nothing could more increase it than by permitting the record to be loaded with unnecessary matter. He said, that when at the bar, he had repeatedly applied to amend, and never had an idea of introducing in the amended bill, the charges of the original bill.

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By annexing the engrossed amendments to the original bill, and by referring in that part of the bill where the amendments should have been inserted, to the annexed amendments, and by referring, at each amendment, to the proper place for its insertion in the original bill, the record will be kept from being defaced, and all the requisite certainty and convenience will be obtained.

It is, accordingly, ordered, that the rule calling upon the defendants to show cause why an attachment should not issue, for not answering the amended bill, be discharged with costs, and, also, that the motion for an attachment and sequestration be denied with costs.

Order accordingly.

**MINTURN against SEYMOUR.**

Where an injunction is allowed by the *Chancellor*, the defendant, before he puts in an answer, may move to dissolve the injunction, on the ground of a want of equity in the bill.

**BUNNER**, for the defendant, moved to dissolve the in- Nov. 2  
junction, though the defendant had not answered, on the ground of a want of equity in the bill. The injunction had been allowed by the *Chancellor*.

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*D. B. Ogden, and Harison, contra.* They raised a preliminary objection to the motion, because the defendant had not answered, and insisted, that except in cases where the injunction was allowed by a *Master*, the defendant is not entitled to move to dissolve the injunction before he has answered.

*S. Jones*, in reply.

THE CHANCELLOR overruled the preliminary objection, but denied the motion upon the merits.

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OGDEN *against* GIBBONS.

*L. and F.*, to whom the Legislature had granted the sole and exclusive right, for a term of years, of using and navigating boats or vessels, by steam or fire, in the waters of this state, assigned to *J. R. L.*, who assigned to the plaintiff, the exclusive right of navigating steam boats, &c. between the city of *New-York* and *Elizabethtown Point*, in *New-Jersey*, for a certain period: *Held*, that the running or employing steam boats, by the defendant, over the waters of this state, for the transportation of passengers, to and from those two places, directly, or circuitously, by using one or more steam boats, and shifting the passengers from one boat to another, at any intermediate point between those two places, without the consent of the plaintiff, or his assigns, was a violation of the right of the plaintiff; and an injunction was granted to restrain the defendant from so using or navigating steam boats, to the injury of the plaintiff.

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PETITION of the plaintiff, stating, that in *October*, 1818, he filed his bill, charging, that he had obtained an exclusive right under Messrs. *Livingston* and *Fulton*, to navigate, by boats moved by fire and steam, between *New-York* and



*Elizabethtown*, to the whole extent of the township; that being in the possession of such right, he was unlawfully interrupted in the exercise of it by the defendant, who was running, without any license, under the exclusive right granted by law to *L. and F.*, two steam boats, called the *Bellona* and the *Stoudinger*, between those two places; that upon that bill an injunction was granted, restraining the defendant and his agents, &c. from navigating, with steam boats, the waters of this state, between the city of *New-York* and *Elizabethtown*; that on the 18th of *August* last, the defendant filed his answer, and then moved to dissolve the injunction, on the matter set up by way of defence and title in the answer, viz: 1. a coasting license under the laws of the *United States*; 2. a license under the laws of this state relative to steam boats. That the motion to dissolve the injunction was denied, on the ground, that the coasting license did not interfere with the exclusive right granted to *L. and F.*, under the laws of this state, and that the title set up under *L. and F.*, was subsequent to the grant under them to the plaintiff, and could not affect it; that the injunction was, nevertheless, modified, so as to confine the operation of it to the whole of the waters in the bay of *New-York*, on the passage or route between the city of *New-York* and *Elizabethtown*, and not to apply it to the waters of the Sound, between *Staten Island* and the state of *New-Jersey*.\*

The petition further stated, that the defendant, after the issuing of the injunction, and the service and notice thereof, and for more than three months past, had procured, and still continued to procure, for a stipulated price, the steam boat *Nautilus*, belonging to *Daniel D. Tompkins*, which usually runs between the city of *New-York* and the *Quarantine Ground* on *Staten Island*, to aid and assist him, the defendant, in the transportation of passengers, travelling and going to and from *Elizabethtown*, to and from *New-York*; that this was done by so running in concert with the steam boat *Bellona*; that the latter boat, almost daily, and agreea-

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\* *Ante*, pp. 48.  
150. 164.

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bly to public advertisement, had left, during the time aforesaid, and still continues to leave the wharf of the defendant, in the township of *Elizabethtown*, with such passengers, and passes with them, on the direct route between those places, until she is met or overtaken by the steam boat *Nautilus*, either on the waters of *Staten Island* sound, or of *New-York* bay, but more frequently on *New-York* bay, into which last mentioned boat such passengers are then received, and in her transported on the waters of *New-York* bay, to the city of *New York* directly, and on the direct route between that place and *Elizabethtown*. That in like manner, and under the like procurement and concert, the *Nautilus*, during the time aforesaid, almost daily, had left, and still continues to take on board at, and leave, the city of *New-York*, with passengers travelling and going from thence directly to *Elizabethtown*, and passes with them on the waters of the bay of *New-York*, on the direct route between those two places, until she is met by the steam boat *Bellona*, either on the waters of the bay of *New-York*, or of *Staten Island* sound, but more frequently on the waters of *New-York* bay, into which last mentioned boat such passengers are then received, and in her transported directly to the dock of the defendant, in the township of *Elizabethtown*, on the direct route thereto, from the city of *New-York*. That the steam boat *Bellona* sometimes takes on board at, and leaves the city of *New-York*, with passengers travelling and going thence to *Elizabethtown*, and on her passage to that place with such passengers, passes over the waters of the bay of *New-York*, to the *Quarantine Ground* on *Staten Island*, where she stops and touches for a few minutes, and then proceeds on with such passengers, over the waters of the bay of *New-York*, until she enters *Staten Island* sound, and from thence passes on through that sound, in the direct course to the defendant's dock in *Elizabethtown*, where she lands the passengers. That the *Bellona* sometimes takes passengers from *Elizabethtown* to *New-York*, on the same

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circuitous route. That the steam boat *Stoudinger*, belonging to the defendant, during the time aforesaid, and almost daily, since the beginning of *August* last, takes on board at, and leaves the *Quarantine Ground*, on *Staten Island*, with passengers travelling and going from *New-York* to *Elizabethtown*, and on the passage to that place passes over the waters of the bay of *New-York* into *Staten Island* sound, and so up to *Elizabethtown*, where she lands her passengers. That, in like manner, the *Stoudinger* takes passengers, who are travelling and going from *Elizabethtown* to *New-York*, on the same route from *Elizabethtown* to the *Quarantine Ground* on *Staten Island*. That such running of the boats aforesaid is injurious to the rights of the plaintiff, and a violation of the injunction. That the injunction was personally served upon *Cornelius Vanderbilt*, the captain of the *Bellona*, but not upon the defendant, as he resides out of this state. That the defendant has, however, full knowledge of the same.

The petition concluded with a prayer, for an attachment against the defendant, and the captain of the *Bellona*, for disobeying the injunction.

This petition was sworn to by the plaintiff, and being duly served, a rule was granted, that the defendant, and others, show cause against it.

In support of the motion, the plaintiff, on the day assigned for showing cause, produced and read two affidavits:

1. Of *John Carlton*, the captain of the steam boat *Atlanta*, in support and confirmation of the facts stated in the petition.

2. The affidavit of *Thomas Van Ford*, jun. stating, that on the 12th of *November* last, the steam boat *Stoudinger*, belonging to the defendant, left the city of *New-York* with passengers for *Elizabethtown*, and proceeded on in her direct route, with such passengers, for *Elizabethtown*.

3. Several other affidavits were, also, read in support of the charges in the petition.

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In opposition to the motion, and on the part of the defendant, it was stated by the defendant, in his affidavit, that on or about the 15th day of *May* last, he entered into an arrangement with *D. D. Tompkins*, for the running of his steam boat *Bellona*, from *New-Brunswick*, to his wharf at *Halsted's Point*, in *Elizabethtown*, and from thence to meet the steam boat *Nautilus*, owned by the said *D. D. Tompkins*, on her way from *Staten Island* to *New-York*, and put on board her, on the waters of *New-Jersey*, the passengers to be brought hither in the *Bellona*, and the said passengers to be transported and carried thence in the *Nautilus*, to the city of *New-York*. That passengers who might offer for the *Bellona*, to be taken and received by the *Nautilus*, at the city of *New-York*, and transported and carried in her, on her return passage for *Staten Island*, to the *Bellona*, in the *Kills*, or *Sound*, aforesaid, and there to be put on board the *Bellona* from the *Nautilus*, and transported and carried thence in the *Bellona*, to *Halsted's Point* aforesaid. That by that arrangement, the said *D. D. Tompkins* was to receive, and uniformly received, the price of twenty-five cents for the passage in the *Nautilus*, which was one half of the whole fare from *New-York* to *Halsted's Point*. That the defendant believed this arrangement was proper, and not a violation of the injunction. That the *Bellona* has so run under that arrangement, ever since the middle of *May* last. That he understood, from what passed when *Cornelius Vanderbilt* was brought before the Chancellor, in *June* last, for an alleged breach of the injunction, that the transportation of passengers to and from *New-York*, and to and from *Elizabethtown*, under the above arrangement, was lawful, and agreeable to the opinion of the Chancellor. He disclaimed all intentional violation of the injunction.

The affidavit of *Cornelius Vanderbilt*, the captain of the *Bellona*, admitted the running of the *Bellona*, and the interchange of passengers between her and the *Nautilus*, as charged by the plaintiff, and admitted in the affidavit of the

+ more

defendant; and he stated, that he understood from the opinion of the Chancellor, on the decision upon the attachment in *June* last, that such a mode of employment of the boats was lawful, and not a violation of the injunction, and he disclaimed all such intention.

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The plaintiff in *propria persona*.

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*S. Jones*, contra.

THE CHANCELLOR. The question arising upon this motion, is, whether the employment of the steam boat *Bellona*, by the defendant, in the transportation of passengers between *Elizabethtown Point* and the city of *New-York*, with the assistance of the steam boat *Nautilus*, is not a breach of the injunction heretofore granted in this cause.

It has been already declared, that the plaintiff was entitled, under a grant from *Livingston* and *Fulton*, to the exclusive right of navigating steam boats upon the waters of this state, on the route or passage between the city of *New-York* and *Elizabethtown*, in *New-Jersey*. Neither the representatives of *L.* and *F.*, nor any other person claiming under a subsequent grant from them, or acting without such grant, could interfere with, or disturb the plaintiff in the enjoyment of his exclusive privilege. This Court is specially required, by statute, to protect, by injunction, the steam boat monopoly granted to *L.* and *F.*, from all disturbance or invasion. It was observed, when the decretal order was pronounced, on a former motion in this cause, that the grant under *L.* and *F.*, of an exclusive right to run steam boats between *New-York* and *Elizabethtown*, was intended to comprehend the entire benefit of all the travelling and passengers going to and from *Elizabethtown* and *New-York*. It meant to embrace the whole stream of intercourse between these two places. It included the use of the waters, on the usual passage between those places, to the entire and

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absolute exclusion of the use of these waters, (so far as the jurisdiction of this state extended,) on such a passage or route, by any other steam boat. It necessarily, and from its very nature, as an exclusive grant, excluded all contiguous and injurious competition.

It appears to me, therefore, that the attempt of the defendant to transport passengers between *Elizabethtown* and the city of *New-York*, by the aid of the *Nautilus*, is a violation of the plaintiff's exclusive right, and an evasion of the spirit and intention of the injunction. The *Nautilus*, employed under his procurement, and by an arrangement to which the defendant was a party, became, for this purpose, and for the occasion, *his boat*. Any other construction might render the grant from *L. and F.*, to the plaintiff, vain and illusory. Whatever pretensions the *Nautilus* may have to navigate the waters of this state under *L. and F.* (and she can have no right but under them,) these pretensions cannot interfere with the right of the plaintiff, to the exclusive navigation between *Elizabethtown*, and *New-York*, because his is the prior grant; and what *L. and F.* could not do themselves, they could not do by their assignee. The assignee can only take what they were competent to give, and they had already parted with their right to the navigation in question.

The right of the plaintiff to transport passengers between *New-York*, and *Elizabethtown*, may be compared to a right of ferriage between two given points; and it is well settled, that where an exclusive right of ferriage exists between two places, no rival ferry can be set up within the same course and line of travel. The just and rational principles of the common law considered every such attempt as a violation of right. Indeed, it must be plain and obvious to the common sense of every man, that the defendant is here doing, with the assistance, and under the cover of the steam boat *Nautilus*, what he cannot do directly with his own boat, the *Ballona*, and yet that the result, and the injurious effects to

the plaintiff, are precisely the same. The *Neutilus* has no more right to be employed in the ferriage belonging to the plaintiff, than the *Bellona*, and yet she is so employed by the act and procurement of the defendant. The two boats, by their joint and concerted operation, are engaged in the very business exclusively granted to the plaintiff. They are engaged in transporting passengers to and from *Elizabethtown* and *New-York*, and it would be a reproach to the justice of this Court, if such a contrivance could be successful.

The circuitous route between *Elizabethtown* and *New-York*, by the way of the *Quarantine Ground*, is equally a violation of the right of the plaintiff, and of the injunction which was intended to prevent it. Such a small and unessential deviation from the direct route, cannot vary the nature of the act so long as the intention is still the same. The object appears equally to transport passengers and carry on the travelling between *New-York* and *Elizabethtown*, and that design cannot lawfully be pursued by any person but the plaintiff, because he is in possession of the exclusive right. While that is the object of the circuitous route, the injury is the same, and the abuse equally within the reach of the injunction. In short, every effort and arrangement, however specious or well devised, for the regular and connected transportation of passengers between *New-York* and *Elizabethtown*, by steam boats, is a trespass on the exclusive right of the plaintiff, and must now be abandoned.

But the defendant, and one of his agents, rely for their excuse upon the impression which they had received of the decision made by me in the case of *Vanderbilt*.<sup>(a)</sup>

There was considerable desultory conversation, in the course of the argument in that case; and it is probable that

(a) He was the master of the *Bellona*, and was brought before the Court, on an attachment for disobeying the injunction before issued. Vide *Livingston v. Ogden and Gibbons*, ante, p. 43. *Matter of Vanderbilt*, ante, p. 57; and *Ogden v. Gibbons*, ante, p. 150—164.

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I may have made observations which misled the defendant. The nature and extent of the plaintiff's right had not then been discussed and duly examined; and what I may have said, must have been in the course of incidental conversation, to which no importance ought to have been attached. The decision is upon record, and to that the party should have looked for his guide, and my opinion was reduced to writing at the time; neither the decretal order, nor the reasoning in support of it, afford the least colour for the impression which has been received.

It is this misapprehension of the defendant, and of Captain *Vanderbelt* that induces me to pause upon the motion for the attachment. I shall be content, therefore, with making a new order in the case, and of withholding the attachment, on condition of the defendant paying the costs of this application. The defendant, by his answer, admits knowledge of the injunction, and professes obedience to it.

The following *Order* was accordingly entered:

"The motion for attachment in this cause being opened by the plaintiff in person, and several affidavits in support of the motion being read; and the said motion being opposed by Mr. *S. Jones*, counsel for the defendant, and several affidavits read on his part, and due deliberation being thereupon had, it is hereby declared, that the running or employment of the steam boats *Bellona*, *Stoudinger*, and *Nautilus*, or either of them in the said petition mentioned, or any other boats propelled by steam, over waters within the jurisdiction of this state, for the transportation of passengers to and from the city of *New-York* and *Elizabethtown*, in the state of *New-Jersey*, whether such transportation be effected directly or circuitously, or by means of one or more boats, or by shifting from one boat to another, at any intermediate point between these two places, without the license or consent of the plaintiff or his assigns, is an infringement of his exclusive right to navigate, for those purposes, with steam boats, over the waters of this state, between the city



of *New-York* and *Elizabethtown*, and a violation of the injunction issued to ~~prohibit~~ that exclusive right.

And it is further declared and ordered, that a copy of the said injunction, and of this order, or of any other order of this Court, in the premises, delivered to the acting master, or in case of his refusal, to recieve the same, left, in some conspicuous place, on board of the said steam boats, or either of them, or of any other steam boat employed, as aforesaid. shall be deemed and taken to be good service thereof, on the master of the boat in which the same shall have been so left; and further, that the service of the said injunction, or other order as aforesaid, on the solicitor for the defendant, shall be taken and deemed good service on the defendant.

And it is further ordered, that the rule to show cause in this cause, be discharged, on payment, by the defendant, of the costs of this application, and on default thereof, that the attachment, as against the defendant, issue."

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LYTLE.

**MOORE against LYTLE AND GIBSON.**

Whether this Court will take cognisance of a cause, where the amount in controversy does not exceed the sum of fifty dollars? Or grant an injunction to stay execution on a judgment in a Justice's Court?

BILL for an injunction to stay execution on a judgment rendered against the plaintiff, for 44 dollars and 15 cents, before a Justice of the Peace, by default. The bill charged, that the plaintiff had a good and meritorius defence, which it disclosed, and that the default was by surprise, and is sufficiently excused, and that he had paid to the justice the sum recovered, by way of deposit, and had offered to pay

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the costs of the suit, and to let the deposit remain with the justice as a security, and that the offers were rejected.

*J. L. Wendell, for the plaintiff.*

THE CHANCELLOR. I have great doubts whether the sum in question is sufficient to justify the interference of this court. A small sum will not bear the expense and burden of the litigation, and the remedy would be worse than the disease. But, perhaps, it may be more advisable to let the objection be raised by the defendant, and the point discussed, than to bar the door in the first instance. I, therefore, hesitatingly, allow the injunction, and under a doubt, whether the demand ought not to exceed the jurisdiction of justices of the peace, which is now fifty dollars. The question will be fairly opened, if the defendant chooses to raise it.

As far back as we can trace the subject, it seems to have been the rule of the *English* Chancery, and which may have been borrowed from the Court of Star Chamber, where the same rule prevailed, (*Hudson's Treatise of the Star Chamber, in 2 Collect. Jurid.* 164.) that if the matter be petty or trivial, and so not worthy the dignity of the court, the defendant might demur. It was a provision in one of Lord Bacon's Ordinances, (Rule 15.) that all suits under the value of ten pounds, were regularly to be dismissed; and his rules come with the imposing character of original constitutional ordinances, for the government of the practice of the Court.

But the jurisdiction of the court was formerly, in practice, extended to very small demands. Thus, in *Coles v. Foley*, (1 Vern. 359.) it was held that a bill in equity would lie for the recovery of ancient quit rents, though very small, as two shillings and three shillings *per annum*, if proved to have been constantly paid; and Sir Wm. Beresford's case was cited in which there had been a decree for rent of

one shilling and three pence, *per annum*. This case was as early as 1685; yet, in another case, a few years earlier, (*Fox v. Frost*, *Rep. temp. Finch*, 253.) the plaintiff had grounded his equity upon the payment of five shillings, as earnest money, to bind the alleged bargain, and on demurrer to the bill, for not having a sufficient sum to warrant a decree, the Court allowed the demurrer.

Afterwards, in 1728, we find the Master of the Rolls (*Anon. Maseley*, 47.) denying an injunction where the original matter at law was only five pounds, though, by letting judgment go by default, it had increased to fifteen pounds; he said that he had dismissed another bill on the same account, because the sum was *originally* "below the dignity of the Court," though by neglect or mismanagement, it had amounted to a competent sum. In *Brace v. Taylor*, (2 *Atk.* 253.) Lord *Hardwicke* dismissed a bill at the hearing, though the defendant did not demur, as being of too small and trifling consequence for that Court, it being for the arrears of an annuity, and only six pounds fifteen shillings in amount. He referred to a case in the time of Lord *Harcourt*, where a bill was brought for tithes, and as the tithes which were due, appeared to be only of the value of five pounds, the bill was dismissed at the hearing.

The next case, which was determined about the same time, in the Exchequer, advanced the requisite sum for the jurisdiction of the Court, to ten pounds, *and upwards*. The bill in *Owens v. Smith*, (*Com. Rep.* 715.) was against an executor, for discovery of assets, and payment of a demand of 10*l.* 10*s.* 2*d.*, but the bill was dismissed without demurrer, and at the hearing, because the demand was "beneath the dignity of the Court."

The sum of ten pounds, fixed by Lord *Bacon*, seems at last to have been assumed as the criterion of equity jurisdiction, but then it must have been an original demand due to that amount, and ~~not~~ one increased to or beyond it, by default or neglect at law. This is the sum mentioned in the

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books; (*Moseley's Rep.* 356. 1 *Eq. Cas. Abr.* 75. note.) and it is agreed, (*Moseley's Rep.* 356. and per *Price, B. Bumb.* 17.) that the bill for that cause may be dismissed upon demurrer, or upon motion, and we have seen that it may be, also, at the hearing. (*Vide* the form of such a demurrer, *Cur. Can.* 229.)

The note in *Eq. Cas. Abr.* and a note to the case in *Bunb.* and to *Beame's Orders in Chancery*, p. 10, state some exceptions to this limitation of jurisdiction, and lay it down, that in cases of charities, or where there is fraud, or where it is a complicated matter, the bill will be retained, though the sum be ever so small. So, it is mentioned in the first of those notes, that a bill will lie in the case of lands, where the value is of forty shillings per annum, but no authority is cited for either of these exceptions, unless it be in the case of a charity, or where the bill is to establish a right.

It is to be observed, that these sums mentioned in the *English* books, are sterling money, and fifty dollars, which is the extent of a justice's jurisdiction, very nearly agrees with the sum adopted as the standard in *England*, and would, probably, be a temperate and just limitation, and best accord with the *English* rule, which appears to be the result of long experience and sage reflection. I may safely apply to the *English* rules of practice, the observation of *Montesquieu*, in respect to the *Roman* law, "Je me trouve fort dans mes maximes lorsque j'ai pour moi les Romains." And I will venture to avail myself of another of his remarks, (*L'Esprit des Loix*, liv. 29. c. 1.) that the spirit of moderation is the spirit of good policy and of good morals, and it is always to be found between two extremes. He illustrates the truth of it by the forms of proceeding in Courts of Justice, which, on the one hand, are necessary to liberty, and on the other, ought not to be too numerous, lest they should defeat the end for which they were insti-

tuted, by rendering litigation endless, and ruining all parties under the weight of examination.

The true objection to the cognizance of small causes by this Court, is, that the litigation would necessarily be vexatious and oppressive to the suitor, and exhaust more than the subject in controversy; and it would evidently be contrary to the policy of the law in the institution of Justices' Courts, which are authorized to determine "according to law and equity." "I shall always," said Lord Northington, on another occasion, "be very attentive to prevent the subject from great waste of expense about matters *by no means adequate to it.*"

I have given this view of the subject, and thrown out these reflections for the consideration of the plaintiff, if his counsel shall choose to hazard the further prosecution of the suit. The injunction is allowed merely as a provisional measure, to bring up a point quite new and untouched in this Court.

Motion granted accordingly.

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BARRERE *against* BARRERE.

Where a divorce, *a mensa et thoro*,<sup>o</sup> is decreed, for cruel and inhuman treatment of the wife, by the husband, the separation will be made *perpetual*, with a *proviso*, that the parties may, at any time, by their mutual and voluntary act, apply to the Court for leave to be discharged from the decree. The wife, under the circumstances of the case, was allowed to retain the custody of an infant son, subject, however, to the future order and direction of the Court; and the husband was directed to pay a certain sum for the support of his wife and child, and the costs of the suit.

BILL for a divorce, *a mensa et thoro*, by the wife against the husband, on the ground of cruel and inhuman treatment. Dec. 13th.

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The parties were married in the city of *New-York*, in *May*, 1814, where they have since resided. The bill charged various acts of personal violence and brutality, on the part of the husband, in *April*, *July*, and *August*, 1818, which were proved; and that he was of a very hasty and ungovernable temper. The defendant, in his answer, admitted the acts charged, though in a much less degree, and alleged that they were owing to the disobedience and provoking language of the plaintiff, whom he charged with being unchaste and dissolute in her conduct, of which, however, there was no proof. After the last quarrel between them, on the 31st of *August*, 1818, when the defendant struck the plaintiff, and dragged her on the floor, by her hair, and would have beaten her with a stick, had not a person interposed, the plaintiff left the defendant's house, taking with her their only child, a boy between two and three years of age. The plaintiff alleged that she separated from her husband, because she considered her personal safety endangered by remaining with him; and that his evil example would be injurious to her child. She prayed for a decree of separation, *a mensa et thoro*; that she might be allowed to retain the custody of her child altogether, or, at least, for a time, and that the defendant should pay a sufficient sum for the maintenance of herself and child.

The defendant submitted to a decree of separation from bed and board, but prayed that his son might not be taken from him, and that he might not be ordered to provide maintenance for the plaintiff. The defendant had carried on the business of a confectioner.

The cause was submitted to the court on the pleadings and proofs, without argument.

*Mulligan*, for the plaintiff,

*Antho*n, for the defendant.

**THE CHANCELLOR.** This is a bill for a divorce from bed and board, upon the charge of cruel and inhuman treatment of the wife, by the husband.

The defendant, in his answer, admits occasional personal violence of a slight kind, and he attempts to excuse it.

The proof is very clear and decided in support of the charges in the bill. A quarrel arose, at one time, on the occasion of her wanting to take a ride in a coachee, with some female friends, because she insisted upon taking her child along with her, a boy of between two and three years of age. At that time, the defendant slapped her in the face, and struck her several blows with a whip, and caught her by the hair; and this was done in the presence of the domestics. At another time, he knocked her down with his hand, and beat her head against the floor, and pulled out a handful of her hair. At a third time, he threatened to beat her for staying over night, upon an errand on his account, in *New-Jersey*, though the testimony is perfectly clear that the absence was justifiable, and almost unavoidable.

There can be no doubt that these acts of bodily violence and harm, amount to that cruelty against which the law intended to relieve. Mere petulance, and rudeness, and sallies of passion might not be sufficient, but a series of acts of personal violence, or danger of life, limb, or health, have always been held sufficient ground for a separation by the ~~common-law~~, which is the law of *England* upon this subject.

Though a personal assault and battery, or a just apprehension of bodily hurt, may be ground for this species of divorce, yet it must be obvious to every man of reflection, that much caution and discrimination ought to be used on this subject. The slightest assault or touch, in anger, would not, surely, in ordinary cases, justify such a grave and momentous decision. *Pothier* says, (*Traité du contrat de mariage*, s. 509.) that a blow or stroke of the hand would not be a cause of separation, under all circumstances,

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unless it was often repeated. The judge, he says, ought to consider if it was for no cause, or for a trivial one, that the husband was led to this excess, or if it was the result of provoking language on the part of the wife, pushing his patience to extremity. He ought, also, to consider whether the violence was a solitary instance, and the parties had previously lived in harmony. All these different circumstances will, no doubt, have their due weight in regulating and directing the judgment of the court.

The plaintiff before me, may not have been always sufficiently discreet in her conduct to her husband ; and it is easy to perceive from the case, that the defendant is a man of strong and ungovernable passions, and that his mind was a little distempered with jealousy. The plaintiff has parents living in *New-York*, and the defendant appears to be a foreigner by birth ; and I should be led to infer, from a fact mentioned by one of the witnesses, that there was a considerable disparity of age between the parties. But there is nothing in the proof against the general demeanor or chastity of the plaintiff ; nor have any of the witnesses been able to point out a single act of egregious indiscretion on her part, since the marriage, in 1814.

The plaintiff is, therefore, entitled to the relief sought by the bill ; but for what time, and upon what terms and conditions a separation shall be decreed, is the next point for consideration ; and I have always regarded this as a delicate and difficult subject of jurisdiction. The *Statute concerning divorces*, (1 *N. R. L.* 197. sess. 36. ch. 102. s. 10, 11.) gives to this court the most enlarged discretion. If it shall appear that the defendant "is guilty of such cruel and inhuman treatment towards the plaintiff, or such conduct towards her as renders it unsafe and improper for her to cohabit with him, and be under his dominion and control, or that he has abandoned her, and neglects to provide for her, it shall and may be lawful for the Court of Chancery to decree a separation from bed and board, forever thereafter, or



for a limited time, as shall seem just and reasonable, or to make such other decree in the premises, as the nature and circumstances of the case require."

There is much embarrassment, on the ground of policy and public morality, with these partial dissolutions of the matrimonial union. It is throwing the parties back upon society, "in the undefined and dangerous characters of a wife without a husband, and a husband without a wife."

*Puffendorf* (*De Jure Gent. et Nat.* lib. 6. c. 1. s. 22.) condemns them, except for a temporary purpose, and in order to punish and reclaim the offending party; and it is said the separation, *a mensa et thoro*, was entirely taken away by the first *English* reformers, as productive of great abuses and scandal in the marriage state. Opportunity ought to be left, and pretty freely left open, for reconciliation. This consideration will have the more weight, if the unhappy parties have a common offspring to be afflicted by their infirmities, and especially, if "wounds of deadly hate" have not pierced too deep into their bosoms. I am persuaded, that it is best, in such cases, to give the parties the means, though they may not, at present, indulge even the wish of reconciliation. There are objections to a separation for a precise or limited time, though such decrees have been rendered. It may inspire a constant fear on the one side, and nourish hopes of revenge on the other. It rather appears to me, to be the most kind and salutary course, to declare the separation perpetual, with a power, however, reserved to the parties, to come together, under the sanction of the Court, whenever they shall find it to be their mutual and voluntary disposition. This will be leaving them to the free operation of contrite affections, and will make the reunion to rest (if it should ever take place) upon a strong sense of its fitness and propriety. I entertain no doubt of my power to annex such a condition to the decree; and, indeed, the reconciliation of the parties does away the force

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*mensa et thoro.*

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land, as to Di-  
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of a decree of separation from bed and board, by the canon or ecclesiastical law, among the nations of Europe.

The decree of divorce, *a mensa et thoro*, by the English law, is said to be either for a time, or without limitation of time. (*Burn's Eccles. Law*, tit. *Marriage*, c. 11. s. 4.)

Yet, by the form of the decree, the separation is only until a reconciliation: *In omni sententia lata inseritur hæc clausula, Dictos N. et M. ratione sanxitæ allegatæ et probatæ, a thoro, mensa, et mutua cohabitatione, absque obsequiis conjugum impensione, donec et quousque duxerint invicem reconciliandos, et non aliter, neque alio modo, separamus.* (*Oughton's Ordo Judiciorum*, tit. 215. s. 3.)

We have a judicial determination upon this point, in the case of *Vanthienen v. Vanthienen*, (*Fitzgib. 283.*) which was heard upon appeal in the *Court of Delegates*, in 1731. The wife had libelled her husband in the Consistory Court of *Dantzick*, in the then kingdom of *Poland*, for cruel treatment, and a sentence of divorce, *a mensa et thoro*, was pronounced; it was further decreed by the Pope's Nuncio at *Warsaw*, that the husband should not have any power over her estate; and we are led to infer from the case, that the decree was, afterwards, confirmed in the Chancery of *Poland*. The question raised by the case in *England*, was, whether the husband, after the decree in *Poland*, had a right to interfere with her administration of a former husband's estate, who, by will, had given a legacy to her, and compel her to administer thereon, or to be admitted to administer for her. The wife relied upon this decree of divorce in bar of his pretension, and she had constituted an attorney; to whom she prayed that such administration might be granted. The husband replied, that they were reconciled subsequent to the divorce, and insisted, that this reconciliation annulled the sentence, and rendered it inoperative. It was held, upon the argument, by the husband's counsel, (*Dr. Strahan*, the translator of *Domat*, was one of them,) to be the settled law, that the subsequent reconcilia-

+ quousque

tion annulled the sentence, and restored all things *ad pristinum statum*. The other side seemed to admit this general result of the reconciliation, and only contended, that it did not affect the right of property which had been vested under the decrees. The Court pronounced a decree in favour of the husband, and must have admitted the doctrine in support of his claim.

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French law of  
Divorce.

By the French law, taken from one of the *Novels of Justinian*, the wife judicially convicted of adultery, was sentenced to imprisonment in a monastery; but the husband within two years might reclaim her; and if he did not, she was to remain in the convent for life, and to be clothed in the habits, and subjected to the austerities of the house. But it seems to have been settled, that the husband, notwithstanding this alteration in her condition, might still, at any period of his life, reclaim her, and this was deemed just and reasonable, as the prosecution was at his instance, and upon his account. It was one of the *Novels of Justinian*, (*Novel*, 134. c. 10.) that fixed the period of two years, for the husband to recover his wife, but the thirty-second *Novel* of the Emperor *Leo*, mitigated the severity of the former ordinance, and it has since been understood, that the husband's right to reclaim his wife was indefinite as to time. *Non intra biennium, sed perpetuo, de Jure canonico, potest revocare.* (*Fournel's Traité de l'Adultere*, p. 308, 309. 320, 231. 326, 327, 328. *Inst. au Droit. Francois par Argou*, tom. 2. 357.) That the husband's time for reconciliation is unlimited, was admitted and shown by *M. Fournier*, and by *M. Talon*, the *Avocat General*, in their ingenious and learned pleadings in the case of *Thome and Joisel*, which is reported at large in the *Causés Celebres*, (tom. 10.) under the title *Feme Adultere*, and of which a copious abridgment is given in *Ferriere's Dict. tit. Autentiquer une feme*. It is a little extraordinary, that so accurate a writer as *Pothier*, should not have adverted to this well-settled improvement of the canon law, and that he should confine the

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husband's right to redeem his wife, to the period of two years, according to the rigid and exploded Novel of *Justinian*. (*Traité du Contrat de Mariage*, n. 527.)

The *French* law to which I have referred, is thus analogous to the *English* canon law, by equally admitting a subsequent reconciliation to control these judicial decrees of separation from bed and board. My object is to show the prevalence and acknowledged policy of that measure, and the practice under the *French* law is, therefore, a case in point, for it is well known, that under the former laws of *France*, divorce, in any case, signified only a separation of goods, and from bed and board, and that the marriage contract, according to the doctrine of all *Roman Catholic* countries, was considered a sacrament, and held indissoluble during the life of the parties. But I ought here to observe, that the analogy has now ceased; for the law of marriage underwent a radical change at the period of the *French* revolution, and in an early stage of it, the revolutionists almost declared war against the marriage contract. The *Code Napoleon* checked, indeed, the unlimited freedom of divorce, but, with the exception of the new *Prussian Code* published at *Berlin* in 1794, it still left the marriage tie in a more relaxed state than is permitted in other nations under the influence of christianity. Marriage is absolutely dissolved by divorce, which may be not only for many reasonable causes which are specified, but for no cause whatever, except the mutual and persevering consent of the parties, duly declared under certain checks and provisions.

Law of Hol-  
land.

If we pass to *Holland*, we shall find these divorces *a mensa et thoro*, in use under the sanction of the civil magistrate; and the law of *Holland*, is, in this respect, very analogous to our own. The decree, according to *Bynkershœock*, (*Quest. Jur. Priv. lib. 2. ch. 8.*) is always with the proviso, *sub spe reconciliationis*, and the jurisdiction of the subject in their temporal courts, is under the influence of the canon law. *De causis matrimonialibus aliquæ in foro nostro sit juris*

*pontificii auctoritas.* (*Ibid*, ch. 10.) The divorce, *a mensa et thero*, is for great cruelty, or imminent personal danger, and a distribution of property is made between the parties, and the matrimonial tie continues: *Interdictis utrique aliis nuptiis.* (*Voet. Com. de divoritiis et repudiis*, s. 16, 17.)

My inference from this review is, that by the common law of England, and of <sup>the</sup> other nations on the continent where the canon law prevails, a time for reconciliation is left open to the parties upon these qualified divorces from bed and board; and the indulgence is founded in sound policy, and dictated by benevolence. The question then arises, whether the decree ought not to pursue the formula given in *Oughton*, and declare a separation until the parties shall be reconciled to each other. I assume that I have competent power to make such a decree, for the statute authorizes the Chancellor to decree a separation "forever," or, "for a limited time," or, to make "such other decree" as the case may require. But such a general decree seems to be of too loose a texture, and to be destitute of the requisite sanction. It separates the parties until they are reconciled, and leaves that event open to dispute. I should really be apprehensive of exposing the court to some portion of that sarcasm which Lord *Thurlow*, in arguing the *Duchess of Kingston's* case, bestowed upon matrimonial causes, in the Ecclesiastical Courts, when he spoke of the frivolousness of their proceedings, and the vanity of their decrees. I prefer that the sentence shall be binding and effectual, until the parties shall have applied to the Court, and received, upon just grounds, a judicial recognition of the certainty and sincerity of their reconciliation. The parties should be encouraged to look forward to that cheering event; and to escape, as soon as possible, from the perils and painful situation in which they are placed by the decree. The canon law, with a paternal solicitude, well worthy of adoption, (*Burn's Eccl. Law*, tit. *Marriage*. ch. 11. s. 4. *Oughton's Ord. Jud.* tit. 215. s. 4.) requires that a motion

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a mensa et thero.

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be inserted in all sentences for divorce, *a mensa et thoro*, that the parties must live chastely, and that neither of them, during the life of the other, can contract marriage with any other person.

These kind admonitions are peculiar to the Ecclesiastical Courts in the exercise of their jurisdiction over matrimonial causes; and if a bill of this kind should fail from the want of proof, the courts do not, even in that case, send the wife back, without due care for her reception. The admonition is not only "that the husband shall take her back," but "that he shall treat her with conjugal kindness." (*Vide* Sir Wm. Scott's opinion in the Consistory Court, in *Douglas v. Douglas*, in *Exors. v. Exors.*) Since the whole of this delicate jurisdiction has been recently committed to this Court, I have no better source to which I can resort for the guidance of my judgment, in this new path of duty, than to the doctrines of the *English* ecclesiastical or canon law. It is a supplemental part of the common law, and seems to be a brief, chaste, and rational code. It forms, in some respects, a contrast to the unwieldy compilations which constitute the canon law of the *Roman Catholic* countries, and which contain very circumstantial, and many very unprofitable regulations, on the subject of marriage and divorce. (*Vide*, *Corpus Juris Canonici*, par *Gibert*, edit. *Geneva*, 1735, tom. 3. *De Sacramentis*, tit. 12. *de legitimo usu matrimonii*, tit. 13. *De impedimentis matrimonii*, tit. 14. *de divortio*.)

It is further understood to be the law, (*The Parishes of St. George and St. Margaret*, 1 *Salk.* 123.) that if the wife be separated from the husband by a divorce, *a mensa et thoro*, the children she may have during such separation are bastards, because a due obedience to the decree is to be presumed until the contrary be shown. If, however, a cohabitation between the husband and wife be made out in proof, the offspring would then be legitimate, for the relation of husband and wife is not dissolved. It only undergoes a very inconvenient suspension, and which is intended to operate as

a continual invitation to the parties to return to their first love.

Another interesting and difficult question is as to the disposition of the child, and the allowance to be made to the wife. It is to be observed that the husband is, in this case, the party egregiously in the wrong, and he is solely responsible for the rupture of the conjugal tie. It appears, also, that his employment as the keeper of a porter-house or ice-cream garden, is not the most favourable for a propitious influence upon the habits and manners of his son. I shall, therefore, in this respect, also grant the prayer of the bill, and consign the care and custody of the child to the mother. But the statute upon this subject (act, sess. 38. ch. 221.) wisely allows these orders to be varied or annulled, at any time thereafter, upon sufficient cause. The allowance to the mother for the child, ought to be quite small, in the first instance; and more especially as some weight ought to be attached to the consideration, that the father may be greatly afflicted by the loss of the presence and guardianship of his son; and the mother will have most persuasive motives to industry and economy, by the duty and blessing of such a charge.

The defendant would not, probably, be able to bear a large pecuniary allowance to his wife, either for her or her child's maintenance. It is said, that the profits of his establishment will enable him to maintain himself and his wife, but the witnesses allude to the case of their living together, and contributing their united efforts for their mutual support. He might be able to maintain her in his own house, and yet not be able to pay a considerable annuity. He owns a leasehold estate, on which he has expended considerable money, and which is charged with a ground rent, and a mortgage debt. Indeed, one of the witnesses supposes that the mortgage, and another bond debt, would sweep away his interest in the land which he holds under a short lease. If he pays 200 dollars a year, towards the mainte-

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the children in  
cases of di-  
vorce & mens  
et thero.

Allowances to  
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nance of the wife and child, it is as much as the circumstances of the case would seem to justify; and if I am mistaken in the amount either way, the parties, or either of them, can, at any time, apply for relief. The usual and proper course, is to refer questions of this kind to a Master, but as the proofs are all before me, and the allowance is so entirely under future discretion, and subject to alteration, I have not thought it necessary in this case, to detain the cause by the delay and expense of a reference upon that point.

*Decree.*

The following decree was entered: "It appearing from the pleadings and proofs, that the defendant has been guilty of cruel and inhuman treatment of the plaintiff, by repeated acts of personal violence, so as to render it unsafe and improper, under existing circumstances, for her to cohabit with him, or to be under his dominion and control. It is therefore ordered, &c. that the plaintiff and defendant be separated from bed and board forever; provided, however, that the parties may, at any time hereafter, by their joint and mutually free and voluntary act, apply to the Court for leave to be discharged from this decretal order. And it is hereby declared to be the duty of each of them to live chastely during their separation, and that it will be criminal, and an act void in law, for either of them, during the life of the other, to contract matrimony with any other person. And it is further ordered, &c. that the plaintiff, according to the prayer of her bill, shall be entitled to, and be charged with, the custody, care, and education of the infant son of the parties in the pleadings mentioned, provided, always, that this order for the custody, care, and education of the said infant, may, at any time hereafter, be modified, varied, or annulled, upon sufficient cause shown. And it is further ordered, &c. that the defendant pay to the plaintiff 200 dollars, a year, to be computed from the date of this decree, in half yearly payments, to be applied towards the support and maintenance of the plaintiff and her son, and that this



allowance is to continue until further order, and be subject to variation, as future circumstances may require. And it is further ordered, that the defendant pay to the plaintiff the costs of this suit, to be taxed, and that she have execution therefor, according to the course and practice of the Court."

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J. B. DAVOUE against FANNING.

Though the legatee may sue alone for his specific legacy, yet where he claims, also, as a *residuary legatee*, all the *residuary legatees* must be made parties to the suit.

A decree cannot be impeached by an original bill, except on the ground of fraud.

Though a decree in a former suit, to which the plaintiff and defendant were parties, cannot be pleaded in bar, until it is signed and enrolled, it may be insisted on by way of answer. And when the decree in the former suit appears on the face of the bill, the defendant may demur.

Where a bill is taken *pro confesso*, against a defendant, who is absent from the state, he may, under the statute, come in, after the decree, and answer and defend the suit. He cannot institute a new suit, while the decree in the former suit remains in force.

If a bill blends together a demand by the plaintiff, as legatee, against the defendant, as executor, with a demand of the plaintiff, in his private capacity, against the defendant, in his individual character, it is good cause of demurrer, and the bill will be dismissed with costs.

THE bill, filed July 27th, 1819, stated, that Frederick Davoue, the father of the plaintiff, being seized of real and personal estate, on the 7th of February, 1809, made his will, by which, among other bequests, he bequeathed to the plaintiff a legacy of 5,500 dollars, payable to him, when he came of full age. The testator, also, bequeathed to the plaintiff

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an equal portion with his other children, of the residue of his estate, after the payment of debts and specific legacies; and made the defendant, and two other persons, his executors. The testator died, June 4, 1809, leaving six children, viz. *Frederick*, *Ann*, the wife of the defendant, *John B.* the plaintiff, *James B.*, since deceased, *Mary E.* and *Harriet*, the two last being minors. The defendant alone qualified, and was the sole acting executor; and took possession of all the estate; the personal estate, amounting to 19,000 dollars, and the real estate to 22,000 dollars. The bill further stated that the defendant had paid a part only of the legacy to the plaintiff, and refused to pay the balance. That the estate of the testator was sufficient to pay all the debts and legacies, and educate and support the infant children. That the accounts rendered to the plaintiff were incorrect and unjust; particularly a charge of 2,128 dollars, and eight cents, commissions, for receiving and paying the monies of the estate, and 352 dollars, and 36 dollars for interest. That the defendant had expended large sums in useless litigation, and in alterations of buildings on the estate. That in a suit in this court, in which the wife of the defendant and *Frederick D.* one of the legatees, were plaintiffs, and the defendant, the plaintiff, and the two infant legatees, were defendants, (the plaintiff then being absent from the state, ~~and did not~~ <sup>having</sup> ~~hear~~ of the suit until the bill was taken *pro confesso*, against the defendant, and a decree entered,) ~~the plaintiff~~ had no opportunity to dispute it; and by the decree in that cause, a large real estate was ordered to be sold, and was advertised for sale on the 27th of *July*, then next. That in his accounts the defendant had charged 2,000 dollars, paid to the plaintiff, in part of his legacy, which was not true; it being an order drawn by the plaintiff, on the defendant, on account of a farm in *West Chester*, fraudulently sold to the plaintiff by him, and to which the defendant had no title, and the plaintiff was evicted. That, in 1814, the defendant being in prison, employed the plaintiff to do business for him,

and promised to compensate him ; that for one service the plaintiff received 100 dollars, and for another 500 dollars, &c. That there is a balance due to the plaintiff, on account of his legacy, of 3,000 dollars. That the defendant is insolvent, and if permitted to have the control of the estate, it would be wasted. *Prayer*, that the accounts of the defendant may be re-examined, and the plaintiff be permitted to contest them ; and that the Master's Report thereon be corrected, if erroneous ; and that the rents and profits, and the proceeds of the sale of the estate, if made, be paid into Court ; and that the sale of the farm in *West Chester*, to the plaintiff, be annulled, on the ground of fraud, &c.

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The defendant *demurred* specially to the bill, and assigned for causes : 1. That the other children of the testator, some of whom were legatees, and all the residuary legatees, ought to have been made parties :

2. That the plaintiff being a party to the suit, stated in the bill, and a decree taken against him, *pro confesso*, was entitled to examine and contest the accounts, and still is entitled to come in and answer, and contest the accounts, and the administration of the defendant, in that suit ; and that if this suit proceeds, the defendant will be liable to answer again concerning the same matters, which are comprehended, and ought to be determined in the former suit.

3. That several distinct matters having no relation to each other, viz : the claims of the plaintiff, as legatee, against the defendant, as executor, and the claims of the plaintiff for services rendered to the defendant, individually, &c. are blended together ; by mingling of which separate matters in the same bill, the proceedings would be intricate and prolix, and the plaintiff be obliged to answer, &c. to separate and distinct matters.

4. That the claims of the plaintiff, for services rendered to the defendant, and for moneys expended to his use, in his private capacity, are matters properly cognizable and triable at law.

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*J. Radcliff*, for the defendant, in support of the demurrer.

*J. Rodman*, for the plaintiff.

THE CHANCELLOR. The defendant has demurred specially to the bill, and assigned in the demurrer several reasons in support of it. The objections all appear upon the face of the bill, and are, therefore, proper subjects for a demurrer.

1. The first objection is to a want of parties. The plaintiff claims from the defendant, as executor to the will of *Frederick Davoue*, deceased, a specific legacy, and he claims as a residuary legatee, and names several persons as being residuary legatees with him. It is a clear point, that they ought to have been made parties to the suit. It was considered in the case of *Brown v. Ricketts*, (3 Johns. Ch. Rep. 555.) as a settled rule, that though one legatee might sue alone for his specific legacy, without making the other legatees parties, yet where he claims as one of the *residuary legatees*, they must all be parties. This demurrer is, therefore, well alleged.

2. Another, and a more fatal objection to the bill is, that it seeks to be relieved against a former decree of this Court, in which the plaintiff, together with the defendant, and the other legatees, were parties. The bill, as to the plaintiff, was taken *pro confesso*, he being absent from the state, but he is entitled (and so it is admitted in the demurrer) to come in and defend that suit, and to open the accounts. The statute (1 N. R. L. 486. sess. 36. c. 95. s. 9.) provides for his case. His remedy is by coming in to defend, under the provision of the statute, and not by instituting a new suit, while the decree in the former suit is left in full force. It must be intended, for the present, that the decree was duly taken against him by default, and was correctly rendered. A decree cannot be impeached by an original bill, except

on the ground of fraud, and no such allegation is made in the bill. So long as the former decree remains undisturbed, it is a bar to this suit. It cannot be pleaded in bar, until it is signed and enrolled, but it might be insisted on by way of answer; (*Anon.* 3 *Atk.* 809. *Kinsey v. Kinsey*, 2 *Ves.* 577.) and when the decree in the former suit appears on the face of the bill, the defendant may demur. (*Redesd. Tr.* p. 196.)

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It would be most disorderly, and lead to great confusion and endless litigation, if a new and original bill between the same parties, and concerning the same matters, could be sustained, while the former decree remained untouched. The decisions of the Court have clearly and wisely established a different rule.

As early as the case of *Read v. Hambey*, (1 *Ch. Cas.* 44. 2 *Freem. Rep.* 179. S. C.) a demurrer to an original bill was allowed, because it sought to alter or change a former decree, and this was considered as a dangerous and irregular proceeding. Lord *Talbot*, afterwards, in *Taylor v. Sharp*, (3 *P. Wms.* 371.) held it to be an established rule of the Court, that a party could not obtain relief against a decree by original bill, "for that the decrees of the Court would be opposite, and contrary, one to the other, which would breed the utmost confusion." The same principle, in nearly the same words, was, also, declared by the counsel for the defendant, on appeal to the House of Lords, in the case of the *Earl of Peterborough v. Germaine*, (1 *Bro. P. C.* 281.) and the doctrine was sanctioned by the Court. The same rule is, also, laid down by Lord *Hardwicke*, in the case of *Shepherd v. Tuley*. (2 *Atk.* 348.) We have, also, the cases of *Granville v. Commoners of Epworth*, (*Bunb.* 56.) and of *Wortley v. Birkhead*, (2 *Ves.* 571. 3 *Atk.* 809. S. C.) in which a demurrer to the bill was sustained for the same cause. The language in the latter case was, that such a bill could not be brought to impeach a former decree, but for fraud in obtaining it. That the opi-

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nion of the Court, in one decree, could not be varied by an original bill, but the party must first get rid of the decree by a rehearing, or a bill of review, or a supplemental bill, in the nature of one, or by appeal, or upon special application to the Court. That as the party might have reached the equity of his case under the former decree, he cannot attain it by a new bill.

The same doctrine has been already recognised by this Court in an analogous case. (*Gelston v. Codwise*, 1 *Johns. Ch. Rep.* 195.)

3. A third reason for the demurrer is, also, well founded. The bill blends together a demand of the plaintiff, as legatee, against the defendant, as executor, and also a demand of the plaintiff in his private character, against the defendant in his private character, being for work bestowed, and money expended, to and for the use of the defendant. A demurrer will lie for such multifariousness of matter which requires totally distinct examinations and accounts. In the case of *The Attorney General v. Corporation of Carmathon*, (*Cooper's Eq. Rep.* 30.) an information was filed for misapplication of some property, held for purposes of public utility, and of other property held in trust for private charity, and a demurrer to the bill for multifariousness was allowed. In the downright language of Lord *Eldon*, on that occasion, "the two things don't hang properly together." The principle of that decision is clearly and perfectly applicable to this case.

The bill must, therefore, be dismissed with costs.

Decree accordingly.

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PHILLIPS and others, Executors of SIMON, against PREVOST and others.

It is a general rule, that where a defendant submits to answer, he must answer fully; but this rule is subject to exception and modification, according to the circumstances of the case: As where the defendant objects to a discovery because the plaintiff has no title.

So, where a bill was filed by the executors of a creditor, claiming under a judgment of more than *thirty-six* years standing, against the legal representatives of the debtor, above thirty years after his death, without accounting for the delay, or showing any attempt to recover the debt at law, and seeking a discovery and account of *assets*; the defendants, after admitting the death of the original parties to the judgment, and the representative character of the plaintiffs and defendants, may object to making any disclosure as to assets, or the material objects of the bill, on the ground of the staleness of the demand, and the great lapse of time.

THE bill stated, that *George Croghan*, deceased, on the 6th of *February*, 1799, executed a judgment bond to *Joseph Simon*, deceased, conditioned to pay 2,200*l.* sterling, on the 6th of *February*, 1782, with interest. That in *April* term, 1779, a judgment was entered upon that bond, in the Court of Common Pleas, in *Westmoreland* county, *Pennsylvania*. That on the 13th of *February*, 1782, *George Croghan*, executed a bond to *J. S.* conditioned to pay 396*l.* on the 13th of *February*, 1783, with interest. That on the 11th of *June*, 1782, *G. C.* made his will, and devised to his daughter and only child, *Susannah*, the wife of *Augustin Prevost*, his real estate, &c. That *G. C.* died, in 1782, seized of certain lands in *Otsego* county, and of divers other lands in the states of *New-York* and *Pennsylvania*. That in 1790, *Susannah Prevost* died, intestate. That four of the defendants are her children. That on the 5th of *November*, 1789, *G. C.* executed two bonds to *Goldsbrow Banyar*; and

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in *December*, 1769, a third bond, and a mortgage on 40,000 acres of land, to secure the payment of the bonds. That in *April*, 1804, *G. B.* assigned the bonds and mortgages to *John K. Beekman*. That in *October*, 1770, *John Morton* obtained a judgment in the Supreme Court of *New-York*, against *G. C.* for 10,000*l.* of debt, which judgment was, in 1804, assigned to *John K. Beekman*. That in *June*, 1804, administration *de bonis non*, with the will of *G. C.* annexed, was granted to the defendant *G. W. P.*, and in *August*, 1805, *John K. B.*, for a nominal consideration, assigned to the defendant *G. W. P.* the bonds and mortgage, and judgment, aforesaid. That *G. W. P.* caused the judgment to be revived, by *scire facias*, against the heirs of *G. C.* and a *fi. fa.* to be issued in *February*, 1806; and the *Otsego* lands were sold for 1,000 dollars to *W. P. Beers*, who assigned and released the same to the defendant, *G. W. Prevost*. That the judgment was revived, and the lands sold, with intent to bar the creditors of *G. C.*, and that *W. P. Beers*, purchased as agent of the defendant, *G. W. Prevost*. That on the 28th of *December*, 1810, the three defendants, *A. P.*, *A. J. P.*, and *S. P.*, released their right in the said lands, to the defendant, *G. W. Prevost*, which was, also, done the more effectually to bar the creditors of *G. C.* That the land is now held in trust by *G. W. P.* for the heirs of *G. C.*, and parts of the land have been sold, and the proceeds divided among those heirs. That *G. W. P.* as administrator *de bonis non*, has received and converted assets to his own use, or apportioned them among the heirs of *G. C.*, and withholds or conceals the amount. That other large tracts of land in *New-York*, and elsewhere, have descended to the defendants, as heirs of *G. C.*, but the situation, value, or disposition of the lands were not disclosed. *Prayer*, for discovery and account, and that the lands descended may be sold for the benefit of the plaintiffs, &c.

The answer of the defendant, *G. W. Prevost*, (filed *December*, 1818,) stated his ignorance as to the debt or claim,



of the plaintiffs, by bond or judgment. It admitted the relationship and character of the defendants. That *G. C.* by will, appointed five executors, all of *Pennsylvania*, and that *Michael Gratz*, one of the executors, married a daughter of *Joseph Simon*, deceased, and that he and *J. Simon* resided in *Philadelphia*. That *M. Gratz* died there, in 1804, and had assets in hand sufficient to satisfy the pretended claim, and all other debts of *G. C.* and he believed that such debt, if any existed, was satisfied by him. The defendant admitted, that he was administrator *de bonis non*, &c. but as to so much of the bill as seeks a discovery and account, and sale of the estate of *G. C.*, the defendant insisted, that considering the circumstances above stated, and the lapse of time, the debt is to be presumed satisfied, and that the defendant is not bound to make any further answer or disclosure in relation thereto.

Six exceptions were taken to the insufficiency of the answer, for not containing a due disclosure.

The master reported that the exceptions were well taken.

Exceptions were made to the master's report, and insisting that the answer was sufficient.

The cause was argued on the exceptions.

Nov. 24th.

*Ch. Baldwin*, for the plaintiffs.

*Burr*, for the defendants.

For the defendants, it was contended,

1. That when a creditor seeks, in equity, satisfaction of a judgment at law, he must show that he had taken out execution. (*Misf.* 115. 1 *P. Wms.* 445.)
2. That a defendant may insist by answer, that he is not bound to answer. (3 *Atk.* 276.)

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*For the plaintiffs, it was insisted, that where a defendant answers in part, he is bound to answer fully. (1 Johns. Ch. Rep. 73, 74. 3 Maddock's Ch. Rep. 70, 72. 11 Ves. 41. 1 Ves. jun. 292. 4 Bro. 12.)*

Dec. 20th.

The cause stood over for consideration until this day.

**THE CHANCELLOR.** The defendant, *George W. Prevost*, having answered certain parts of the bill, does not submit to answer that part of the bill which seeks a discovery and account of the assets of *George Croghan*, deceased, which may have descended to him as heir, or have come to his possession as administrator. His objection is founded upon matter appearing upon the face of the bill, and from which he insists that the discovery would be useless, as the plaintiffs have no subsisting valid demand, which can, or ought to be enforced in this court. The demand of the plaintiffs is founded upon a foreign judgment entered against *Croghan*, in 1779, and upon a bond given by him, in 1782, and the bill states that the plaintiffs are executors of the creditor, and that *Croghan* died in 1782.

Here is a lapse of thirty-six years since the creation of the debt, and the death of the defendant's ancestor, and the delay is not accounted for or explained, nor does there appear to have been any attempt to recover the demand at law.

The question is, whether the defendant is bound, under the circumstances of the case, to disclose and render an account in his answer, of the assets, real or personal, of *Croghan*. This brings up a point which has been very much discussed, and concerning which the *English* books abound with contradictory decisions.

I had occasion to examine the point, in the case of the *Methodist Episcopal Church v. Jaques*, (1 Johns. Ch. Rep. 65.) and it appeared to me, from the short examination which I was then enabled to make, that it was under-

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stood to be the general rule of pleading, that if a defendant submits to answer, he must answer fully, but that the rule was subject to exceptions; and that, at any rate, if the defendant puts himself upon an objection to a full answer, it must be of a matter which would form a clear and absolute bar to the demand. The defendant, in that case, did not place himself upon such an objection, and there was no decided opinion given upon the general question.

Lord Eldon (16 Ves. 387.) said, that the old rule, before Lord Thurlow's time, was either to demur, or plead, or answer throughout, and he calls the new mode of answering to part of a bill, and refusing to answer to the residue, a sort of illegitimate pleading. In support of the old rule, the case of *Richardson v. Mitchell*, (Mich. 1725. *Select Cases in Chancery*, 51. 8 Viner, 544. pl. 6. 2 *Eq. Cas. Abr.* 67. pl. 5. S. C.) may be cited. That was a bill to set aside a purchase, and to have a discovery of the site and profits of an estate, and the defendant, by answer, insisted he was a purchaser, and that he was not obliged to make a discovery. But Lord King allowed an exception to the answer, though what he answered might have been good by way of plea; and the case of *Stephens v. Stephens*, before Lord Macclesfield, was cited, in which to a bill for discovery of rents and profits of an estate claimed by will, the defendant claimed title, and insisted he was not obliged to account until the right was determined. The Chancellor, however, held, that though it might have been good by way of plea, yet having answered, he must answer the charge in the bill.

This decision by Lord King, in the case of a purchaser, is clearly overruled by a case which I shall mention, before Lord Loughborough, and which seems to be acquiesced in. There are, also, some of Lord Hardwicke's decisions, which do allow the defendant to object, by answer, to a further answer.

Thus, in *Gethin v. Gale*, (cited in *Sweet v. Young*, Amb. 363.) the bill was by an heir and creditor against a

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devises, for an account. The defendant insisted in the answer, that the plaintiff was not entitled to any debt owing from the estate of the testator, or to any legacy under his will, and, therefore, the defendant was not compellable to account, or discover to the plaintiff, the testator's estate. On exceptions to the answer, and which had been allowed by a Master, Lord *Hardwicke* held the answer sufficient, as the plaintiff's right was not apparent. I think that Lord *Eldon* has somewhere said, that there must be some mistake in the observations imputed to Lord *Hardwicke*, in that case; but I presume there was no mistake in the fact, that a defendant refusing, in his answer, to discover and account, for reasons therein assigned, was not required to answer fully. So, in another case before Lord *Hardwicke*, (*Hogwood v. Selwin*, 3 Atk. 276.) the defendant, in his answer, insisted, that he was not bound to make a discovery that would subject him to statute disabilities, and the answer, on exceptions taken, was held sufficient, and the Chancellor observed, that the defendant could not have demurred, for that would have admitted the facts charged to be true. In *Finn v. Finch*, (2 Ves. 491.) the defendant objected, in his answer, to certain discovery; and in the discussion of the subject, Lord *Hardwicke* observed, that you could not ask a discovery of him whom you might examine as a witness.

The contests and embarrassments respecting this mode of pleading, first began, in the Court of Chancery, under Lord *Thurlow*. I say in the Court of Chancery, for the rule is well established in the equity side of the Court of Exchequer, that a defendant may, in his answer to part of a bill, object to a further answer. Thus, in *Randall v. Head*, (Hard. 188.) the Court held, that where the defendant, in his answer, denied the custom by which the plaintiff claimed tithes, he need not discover the amount or value of the tithes, until the right of the plaintiff had been tried, and if found against the defendant, he should be examined upon interrogatories, to discover his knowledge. So, again, in

*Sect. v. Young*, (*Amb.* 353.) the defendant, in his answer, as executor, denied the plaintiff's pretension, as next of kin, to an account, and refused to set one out, and the Court of Exchequer held the answer sufficient. The same rule was followed in the case of *Jacobs v. Goodman*, (3 *Bro.* 489, note. 2 *Cor.* 282. S. C.) in which the plaintiff stated a copartnership, and called for an account. The defendant, in his answer, set out a special agreement, and denied all other concern with the plaintiff, and stated no account. On exception to the answer, it was held by the Court of Exchequer, that the plaintiff was not entitled to an account, unless there was a partnership, and that the answer was sufficient. If it were not so, any man might compel the first mercantile house in London to account. So, also, in *Richardson v. Hilbert*, (1 *Anst.* 65.) on a bill by an heir against a trustee, the defendant said he never acted as trustee, and did not answer the charge of fraud; and the answer, on exception, was held sufficient, for the defendant, disclaiming all interest, had reduced himself to a mere witness. Another case in the Exchequer was cited by the counsel in 11 *Versey*, 286. in which upon a bill by a vicar against the occupier, the latter by his answer denied the vicar's right, and did not set forth the quantity and value, and an exception to the answer was overruled. Indeed, the Exchequer practice is admitted by Lord Eldon, who supposes it may be attended with less inconvenience, as by the practice of that Court exceptions to an answer are not referred to a master, but go before the Court for determination, in the first instance.

The first case which seems to have given rise to the discussion in Chancery, was *Cookson v. Ellison*, (2 *Bro.* 252.) The plaintiff had made a defendant a party, who had no interest, and might have demurred, but he answered all but one interrogatory. He had, in fact, stated part of a conversation, and not the whole; and Lord Thurlow said, that as the defendant had submitted to answer, he could not enter into the question, whether a demurrer or plea would have

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been allowed, but he must answer fully, and he allowed the exception to the answer. Lord Kenyon, afterwards, when sitting as Master of the Rolls, in *Newman v. Godfrey*, (2 Bro. 322.) said, that this case was wrong; and he held, that where the defendant, by a disclaimer, had reduced himself to a mere witness, he was not bound to answer further. But Lord Thurlow, in *Cartwright v. Hatley*, (3 Bro. 1301 1 Ves. jun. 292. S. C.) again asserted the same doctrine, which he had laid down in *Cookson v. Ellison*; and in *Shepherd v. Roberts*, (3 Bro. 239.) he applied it to a different case than that of a witness. The plaintiff claimed to be a partner, and called for an account. The defendant, in his answer, denied the partnership; and the Chancellor, on exception, held that the defendant must answer fully, and that he should have pleaded that he was not a partner.

Thus stood the cases on the point, when Lord Loughborough took the great seal, and he seems to have followed Lord Kenyon, and to have overruled the doctrine of Lord Thurlow, on this point of pleading.

In *Jerrard v. Saunders*, (2 Ves. jun. 454.) the defendant, in his answer, stated a purchase for a valuable consideration, without notice, as a bar to a further discovery. The answer was excepted to, on the ground that a defendant who submits to answer is bound to answer fully. But the Lord Chancellor overruled the exception, and said that *Cookson v. Ellison* was certainly erroneous, and that in *Shepherd v. Roberts*, Lord Thurlow afterwards changed his opinion. Again, in the case of the *Marquis of Donnegal v. Steuart*, (3 Ves. 446.) the defendant, in his answer to a bill for an account, stated facts, and denied the ground upon which an account was prayed; on exception to the answer for not setting forth an account, Lord Loughborough said, the answer denied the species of dealing to entitle the plaintiff to an account, and he held the answer sufficient. So, also, in *Phelps v. Caney*, (4 Ves. 107.) it was held, that an administrator disputing, by his answer, the foundation of the bill,

viz. a balance of accounts against the intestate's estate, was not bound to set forth an account of the personal estate by way of schedule.

The weight of authority was, thus far, decidedly in favour of the practice in the Exchequer, when the question first came under the review of Lord Eldon.

In three cases which were brought before him in succession, (*Dalder v. Lord Huntingfield*, *Foulder v. Stuart*, and *Shaw v. King*, 11 Ves. 288. 302. 305.) the same point was raised and much discussed. His lordship felt the difficulty and embarrassment of the question, and avoided any decided opinion, though the inclination of his mind was evidently in favour of the rule declared by Lord Thurlow. He said, "It would be a very painful and difficult duty, when the Court was called to it, to say which of the various and discordant opinions expressed by Lord Thurlow, Lord Kenyon, Lord Rosslyn, and Lord Chief Justice Eyre, was right." He thought that whenever the question came fairly before him, it would be infinitely better to decide that the objection should be made by plea rather than by answer; and that the question came to this, how much of the answer, considered as a plea, would be a good defence to the whole prayer for discovery and relief. The proceedings would be less barthensome and expensive by plea, which brings forward a fact to displace the equity, than by allowing the defendant to answer just what he pleases, and compelling the plaintiff to reply to the answer, as he found it, and go to proof. He was convinced the forms of pleading could not stand as they then were, upon the reported cases, for it was a general rule, though with exceptions, that the bill and answer should form a record, upon which a complete decree might be made at the hearing. He stated these difficulties in *Rose v. Teed*, (15 Ves. 372.) and again, in *Sommerville v. Mackay*, (16 Ves. 387.) where he observed that the inconvenience of this new mode of pleading was, that the defendant was not judged of by the Court, in the first instance, (as

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it was by the Exchequer Practice,) but it went first to the master, upon exceptions to the answer, and then to the Court, upon exceptions to the report.

This is the result of the cases before Lord Eldon. He has stated the inconvenience of this new mode of pleading, which had been sanctioned by Lord Kenyon, and Lord Rosslyn, but none of the cases contain a direct decision of his upon the point, either way. As far as adjudged cases go, the preponderance is in favour of the new rule, as his lordship has been pleased to term it. It is conceded in all the discussions, that there are excepted cases to the old rule; that if the defendant answers at all, he must answer throughout; as where the discovery would criminate, or where the defendant sets up a purchase for a valuable consideration. Lord Chancellor Manners, who had followed Lord Thurlow's rule, in *Leonard v. Leonard*, (1 Ball. & Beat. 323,) though he admitted, at the same time, that there was no question so unsettled, makes a third exception in *Stratford v. Hogan*, (2 Ball. & Beat. 164.) to the rule, that where a party undertakes to answer, he must do it fully. He says a solicitor may, in his answer, refuse to discover deeds or facts confidentially communicated to him by the client.

It is very difficult to know what to do with a course of pleading so extremely unsettled. I have recently held, in the case of *Green v. Winter*, upon exceptions to an answer, that where the defendant had disclaimed all interest in the subject matter of the interrogatory, and reduced himself to a mere witness, that he was not bound to answer inquiries as to the situation and value of the subject. The inquiry would be perfectly useless, for the answer could not be read in evidence against any other person; and I could not perceive the propriety, or feel the necessity of requiring a further answer, merely to serve the curiosity or convenience of the plaintiff. Nor can I perceive the good sense of requiring long accounts and schedules from a defendant, when a defence is set up in the answer, which meets the title. If



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the master of defence should fail, the defendant might then be required to answer further; or if an account should be decreed, cannot the defendant be compelled to answer upon interrogatories, to the matter of the account?

The strong inclination of Lord Eldon's opinion, that a defendant could not answer as to part of a bill, and refuse, in the answer itself, to answer the residue, was declared by the Vice-Chancellor, in *Mazaredo v. Maitland*, (8 Madd. Ch. Rep. 66.) to be so useful a rule that he should always adhere to it. I presume, however, he must be understood to mean, under the exceptions which Lord Eldon himself had agreed to, and, perhaps, there may be other exceptions equally passing. The great point, in the case before me, now occurs: is the defendant bound to go on and disclose the assets of his ancestor, under the denial of the plaintiff's right to them? The argument, in the cases, in favour of a full answer is, that the defendant should raise his objection by plea. The whole controversy resolves itself into the mode and form of pleading, and may safely rest upon a question of comparative convenience. The defendant may insist upon the benefit of the statute of limitations, in his answer, as well as by plea. This has been done repeatedly. (*Lucas v. Briggs*, 3 Atk. 105. *Prince v. Heylin*, 1 Atk. 493. *The Equity Draftsman*, p. 369.) But here there is no statute of limitations to plead, for the demand is stated to be founded upon specialty, and the defendant relies, in his answer, upon the staleness of the demand, and the lapse of time, as a bar to the aid of the court. A plea of payment, and a reliance upon the presumption in support of it, as is the course at law, I apprehend, would not do in this case, for payment is matter of defence, on taking the account before the master. The province of the plea is quite limited in this Court; and is confined to certain precise, single, and specific matters of defence. The answer is more loose and comprehensive, and embraces a large field of equitable matter. If the case be evidently such, upon the face of the pleadings,

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as that an account cannot be decreed, why should an account be stated in the answer? It would be entirely useless, unless the plaintiff can make out a case proper for a reference to take an account. The defendant had no other way to raise the objection in pleading, but by the answer, and this consideration has great weight in favour of the sufficiency of the answer. He could not have demurred to the bill, for this would be depriving the plaintiff of the opportunity of accounting for the lapse of time. In an ordinary case, perhaps, an executor ought to discover assets, though he denies the debt; and as the Court of Exchequer said, in *Bandel v. Heap*, already cited, there is no inconvenience in the case. But here would be very great inconvenience to the defendant to meet (when the plaintiff had no just title) all the charges in the bill about the complicated arrangement and settlement of the estate of *Croghan*, among the heirs. Here the plaintiff comes with a demand, after lying by thirty-six years, and, under cover of that stale claim, seek to rip up the settlement of the family estate.

Lord Hardwicke, in *Lacon v. Briggs*, said, that to decree an account against an executor, after the plaintiff's intestate had been dead twenty-seven years, and the defendant's testator ten years, and no demand in seventeen years, would be making one of the worst precedents for disturbing the peace of families. And in *Sturt v. Mellish*, (2 Atk. 610,) he refused to direct an account, on the presumption of satisfaction from length of time, and an acquiescence by the plaintiff for fourteen years. The present case, as it stands, is much stronger than either of those referred to; and I cannot see the fitness of compelling the defendants to state an account of the assets of *Croghan*, when it would be impossible, without further explanation, to decree an account.

It is no doubt a good general rule, that the defendant shall not stop short in his answer, but that having submitted to answer, he shall fully answer. If he consents to detail part of a conversation, why should he not detail it entirely? If

the defendant in this case had given an account of the assets in part, he ought to have done it in full, because he should have taken his objection in time, if he intended to rest upon it. He cannot select part of a question, and refuse to answer the rest. In *Agan v. The Regent's Canal Company*, (*Cooper's Eq. Rep.* 212.) the Vice-Chancellor considered it as a uniformly settled practice, that a defendant who answers in part must answer fully as to that point, and cannot refuse on the ground of immateriality, but he did not touch the great question in which the answer objects to a discovery, because it denies the title. In *Somerville v. Maskey*, from which case Sir John Leach extracted Lord Eldon's opinion, as to the rule to which he meant to adhere, the defendant had answered so fully as even to give a schedule of books and letters relating to a trade, but refused to produce the books; and the only question was, whether he ought not produce them. There cannot be any inflexible rule of pleading upon this subject. We have seen how far it is already subject to modification and exception, according to circumstances. The reason and convenience of the case must determine when, and how far, the application of the general rule, which I am willing to recognise as a general rule, is to be controlled. The case before me appears to be one in which the defendant may, by answer, object to a disclosure of assets, by putting himself upon the great lapse of time, which must, of course, (unless sufficiently accounted for,) stop the taking of an account of the estate, and cause the bill to be dismissed. This case resembles that of *Ellison v. Moffat*, (1 *Johns. Ch. Rep.* 46.) in which the real and personal representatives of a testator were called on by a creditor to account, after a lapse of twenty-six years; and they declared, in their answer, that they were unable to account, and insisted on the staleness of the demand, and the lapse of time, and on that ground the bill was dismissed. The defendant has here admitted himself to be an heir, and

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administrator of *Croghan*, but he has not attempted any answer whatever, or made any partial disclosure, as to the substance and purport of the bill. He has placed himself, at once, upon the objection to the plaintiff's right of action; and this case has as good pretensions, as that of an answer setting up a purchase, to form an exception to the general rule.

I am, accordingly, of opinion, that the objections to the Master's report are well taken, and that the answer is sufficient.

Exception allowed.

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SEARLE & ADAMS *against* SCOVELL.

Where a ship puts into an intermediate port, in distress, and is condemned as unseaworthy; and it becomes necessary, for the transportation of the cargo saved to its destined port, to hire another ship, the cargo, on its arrival at the port of destination, is chargeable with the *increase* of freight arising from the charter of the new ship: That is, the *extra* freight beyond what the freight would have been under the original charter-party, if the necessity of hiring another ship had not intervened. The owner of the goods is not responsible both for the old and new freight.

To ascertain such *extra* freight, the proper rule seems to be, to determine the difference between the amount of the freight under the original charter-party, and the *rateable freight*, for the goods saved to the port of necessity, added to the freight of the new ship hired to carry on the goods.

Dec. 3d and  
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BILL for an injunction, filed June 14, 1819. The plaintiff, *Caleb Adams*, master of the ship *Middlesex*, which had been chartered by *R. Pettit*, of *London*, while sailing on the voyage, with a cargo of goods on board, from *London*, bound to *New-York*, was obliged to put into *Fayal*, in distress, where

the ship was condemned as unseaworthy, and sold for the benefit of all concerned. Part of the cargo had been thrown overboard on the passage from *London* to *Fayal*, and a part, being damaged, was sold at *Fayal*, to defray the necessary expenses there. The plaintiff *A.*, in order to procure the transportation of the residue of the cargo, in his possession, to *New-York*, as master, acting for the benefit of all concerned, according to his best judgment, and the advice of the American consul at *Fayal*, on the 29th of *March*, 1819, entered into a charter-party with *James Searle & Co.* agents of the plaintiff *S.*, owner of the ship *Enterprize*; by which he hired so much of the tonnage of the ship *E.*, as was sufficient to stow the residue of the cargo of the *Middlesex*, to be carried to *New-York*, and for the transportation of which he engaged to pay two thousand dollars freight, on the delivery of the goods at *New-York*. The master of the *Enterprize* signed a bill of lading, in the usual form, for the goods, to be delivered at *New-York* to *A.* or his assigns, he paying freight, 2,000 dollars, as per charter-party. A part only of the goods so re-shipped belonged to *R. P.* of *London*, and were consigned to the defendant; the remainder of his goods had been thrown overboard, or sold as damaged: the residue of the cargo of the *Middlesex* belonged to different persons, who were general shippers in the *Middlesex*. The *Enterprize* arrived at *New-York* on the 17th of *May*, 1819, when an adjustment of the freight of the cargo from *Fayal* to *New-York*, was made by an insurance broker, so as to charge the owners of the several parcels of the goods, with a rateable proportion of the 2,000 dollars. Upon this adjustment, the freight of the goods belonging to *R. P.*, consigned to the defendant, was charged with 1,338 dollars and 19 cents. Each owner and consignee of the goods entered their respective parcels at the custom house, and paid their proportions of the freight from *Fayal*, agreeably to the adjustment, except the defendant, as consignee of the part belonging to *R. P.* The plaintiff *A.* offered to deliver the

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goods belonging to *R. P.* to the defendant, as consignee, on his paying the amount of freight charged, according to the adjustment; but the defendant refused to accept the goods, and pay the freight. To protect the *lien* of the plaintiff *S.* on the goods for the freight, *A.* offered to enter the goods at the custom house, as consignee, under the bill of lading; but the collector, *D. G.*, refused to allow such an entry to be made.

The bill also charged, that the defendant omitted to enter the goods, in order to defeat the *lien* of the plaintiff *S.*, and that on the 4th of *June*, 1819, the goods were taken from the ship and possession of the plaintiffs, by order of the collector, and deposited in the public store, agreeably to law. On the 5th of *June*, the defendant was allowed to enter the goods, and thus obtained possession of them, with a view to defeat the *lien* of *S.*, the plaintiff, for the freight. That the plaintiff *A.*, having become personally responsible to the plaintiff *S.* for the freight of the goods belonging to *R. P.*, by the charter-party entered into at *Fayal*, shipped the goods in his own name, consigned to himself, for his own indemnity. The bill further charged, that by the delivery of the goods to the defendant, the plaintiff *A.* had lost all security for such indemnity, except the personal responsibility of the defendant. The bill prayed for an injunction to restrain the defendant from selling and disposing of the goods so received by him from the public store, until the freight was paid; and that the defendant may be compelled to pay such freight to the plaintiff *S.*, or deliver over the goods to him, &c. An injunction was accordingly issued.

The defendant put in his answer, on the 28th of *July*, admitting the material facts stated in the bill; but denying that the plaintiff *A.* had power, by any acts at *Fayal*, to bind *R. P.*, or the defendant, or the goods, for the freight of the *Enterprise*. The defendant insisted that he could not be subject to a greater freight than what was provided for in the first bill of lading. He stated, that acting merely as agent, he

did not consider himself authorized to pay the freight demanded, without the judgment of a competent Court. He denied any improper views or intention to defraud the plaintiff S. of the freight; and averred his ability to pay the freight and costs, if so directed; and that he had offered security to pay the freight, if required, which had been refused, &c.

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A motion was now made to dissolve the injunction.

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Gifford and T. A. Emmet, for the defendant, in support of the motion, contended, on the ground stated in the answer, that the master had no power to bind the cargo for the freight from *Fuzat*, under the new charter-party of the ship *Enterprise*. They cited 2 *Campb. N. P. Rep.* 42. 10 *East*, 378. 4 *Rob. Adm. Rep.* 236. 3 *Starkie's N. P. Rep.* 1. *Marsh. on Ins.* 541.

*Boyd, contra*, contended, that the master, at *Fuzat*, became the agent of the owners of the cargo, from necessity, and had a right to bind the cargo for the new freight, for the transportation of it to *New-York*, on the same principle that he had a right to hypothecate or sell a part of the cargo, for repairs of the ship, and to enable him to prosecute the voyage. He cited 3 *Rob. Adm. Rep.* 240. *The Gratitude*, 1 *Johns. Rep.* 115. *Laws of Oleron*, art. 4. *Laws of Wisbuy*, art. 16. *Ord. d'Amsterdam*, art. 3. *Ord. Rotterdam*, art. 147. *Molloy, J. Marit.* b. 2. c. 4. s. 5. 2 *Burr. Rep.* 682. 1 *Term Rep.* 611. note. *Doug.* 222. 231. 9 *Johns. Rep.* 21. 2 *Camp. N. P. Rep.* 623. *Marsh. on Ins.* 378. 500. 1 *Emerig. des Ass.* 428. 9 *Mass. Rep.* 548. 10 *Mass. Rep.* 192. 5 *Johns. Rep.* 262.

The cause stood over for consideration to this day.

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THE CHANCELLOR. The material charges in the bill are not denied in the answer, but the motion for dissolving the

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injunction is founded upon the doctrine set up in the answer, that the master of the ship *Middlesex* had no power, while at *Fayal*, to bind the goods, or the owner of them, for the extra freight arising from the hire of the ship *Enterprise*.

We are, upon this motion, to take, as true, the charges in the bill, that the ship *Middlesex* put into *Fayal* in distress; that part of the cargo was lost by the perils of the sea; that the ship was properly condemned as unseaworthy; that it became necessary for the purpose of conveying the cargo that was saved, to *New-York*, to charter the ship *Enterprise*, and that the captain acted with good faith, and to the best of his judgment, throughout the transaction.

Under these circumstances, I take the rule of law to be, that the cargo brought to *New-York* was chargeable with the increase of the freight arising from the charter of the new ship. Whether the amount of freight, according to that rule, and under the complicated circumstances of this case, has been correctly ascertained, is not now the question. The important point now in dispute is, whether the owner of the cargo delivered at *New-York*, is bound to pay the original freight only, or whether the plaintiffs are entitled to demand, in lieu of it, the new freight contracted for at *Fayal*. The plaintiffs, in their bill, claim only the new freight from *Fayal* to *New-York*, according to the adjustment, and the defendant, in his answer, seems to admit that the original freight, as contracted for by the charter-party at *London*, was due, and that freight he has offered to pay.

It is the duty of the master, when his vessel is disabled in the course of the voyage, to procure another, if he can, to take on the cargo.

He is, in such case, from necessity, the agent of the owner of the cargo; and his acts, in relation to the cargo, are binding upon it.

It is understood to be the duty of the master, when his vessel is disabled in the course of the voyage, to procure another, if he can, and take on the cargo. (*Emerigon*, tom. 1. 427, 428. *Wilson v. The Royal Exchange Insurance Company*, 2 *Campbell's Nisi Prius*, 623. *Scheffelin v. The New-York Insurance Company*, 9 *Johns. Rep.* 21.) This duty arises from the character of agent for the owner of the cargo, which is cast upon him from the necessity of the case; and in that character he is bound to act for the



best interest of all concerned. His acts, in the execution of such a trust, and in relation to the property under his care, ought to be valid and binding upon the property, except in cases where his power is limited by positive rules.

*Emerigon*, (tom. 1. 429 to 433.) lays down this doctrine, and declares that if the ship be forced by necessity into a foreign port, the captain becomes the agent of the owners of the cargo, as well as of the ship, and he is bound to see to the preservation of the cargo, and to do whatever the circumstances of the case shall dictate to be for the best, and what it is to be presumed the owners would do, if they were present. His character of master invests him with the care and responsibility of a general agent of the ship and cargo; and he would be very blameable, continues *Emerigon*, if he left the cargo at a foreign port, while he had it in his power to carry it by another vessel to the port of destination.

These general principles, in respect to the power and duty of the master, in a case of extremity, have been repeatedly recognized in the *English Courts*.

In *Miller v. Fletcher*, (*Doug.* 231.) Lord *Mansfield* said, that the captain, at an intermediate port into which he was forced by necessity, had an implied authority to do what was right and fit to be done, as if it were his own ship and cargo; and this general discretion arising from the necessity of his situation, was again laid down as sound doctrine, by the King's Bench, in *Plantamour v. Staples*, (1 *Term Rep.* 511. note.) But the power of the master over the cargo, in situations of distress, was much more fully discussed in the case of *The Gratitude*, (3 *Rob. Adm.* 240.) and the principles which were there brought forward, are so clearly illustrated, and so powerfully enforced, that they can scarcely fail to command universal conviction.

The language of that case is, that considering the peculiar

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situation in which a master is placed, in times of danger, and his known power over the cargo in other analogous cases, such as *Jettison* and *Ransom*, it would seem to follow, as an essential provision of the system of maritime law, that he should have a power and authority over the cargo adequate to the purpose of discharging his trust, and providing for the safe delivery of it at the port of destination. The opportunity of abuse exists equally in the cases of acknowledged power, and cannot impeach the soundness or utility of the general principle. And though, in the ordinary state of things, the master is a stranger to the cargo beyond the purposes of safe custody and conveyance, yet in cases of instant, and unforeseen, and unprovided for necessity, the character of agent and supercargo is forced upon him by the general policy of the law. It is not to be supposed the law intended that valuable property in his hands should be left without protection and care; and he must, in cases of emergency, exercise the discretion of an authorized agent. The cargo is not to be left at the port of necessity to perish for want of care. The master must exercise his judgment, whether it would be better to tranship the cargo, if he has the means, or to let it remain. He may bind the cargo, for repairs to the ship. He may sell part of the cargo for the purpose of applying the proceeds to the prosecution of the voyage, or he may hypothecate the whole for the same purpose. If he sells, the law does not fix any aliquot part, though it must be of a part only; and generally speaking, it must be adequate to the occasion. What is reasonable and just, in respect to the execution of his powers in such cases, is legal.

Upon the doctrine of these decisions, (and which has received the sanction of the Supreme Court, 9 *Johns. Rep.* 29.) there can be no doubt of the authority of the master, in a case of necessity, to hire another ship at the foreign port, and in the character of agent, to charge the cargo with the extra freight of such renewed voyage. The necessity of

this power becomes the more apparent, if it is now to be considered as settled, (*Van Omeron v. Dowick*, 2 *Campb. Nisi Prius*, 42. *Wilson v. Millar*, 2 *Starkie's Nisi Prius Rep.* 1.) that the master cannot put an end to the adventure by selling the cargo at the foreign port, without any view to a further prosecution of a voyage, even though such a sale would be the most beneficial course for the owner.

The power of the master to hire another vessel for the completion of the voyage, and to charge the cargo with the increased freight, is not only to be deduced from general principles of maritime law, but it is a power explicitly recognised and admitted in the books.

*Emerigon* (*ubi supra*) raises and discusses the question, at whose expense the new ship is to be hired. He is of opinion that the captain ought to have his election, either to take the entire freight first agreed, and assume upon himself the freight of the new ship, or to charge only a rateable freight for the proportion of the voyage performed in the first ship, and to let the freight of the substituted ship be at the charge of the cargo saved and transported. It is much better, he says, that it should be considered the duty of the master to hire another ship, and that the charge of the increased freight should be at the expense of the cargo, than that it should be left to his own volition whether or not he would hire another ship at his own expense, and complete the voyage.

*Valin* and *Emerigon* did not agree in their construction of the ordinance of the marine, upon this subject. According to the former, (tit. *Du Fret*, art. 11. tom. 1. p. 653.) the master is not obliged to hire another vessel to take on the cargo, and is only to do so, if he means to earn and demand his entire freight, instead of remaining contented, at the interruption of the voyage, with his *pro rata* freight; and if he hires another vessel, he does it at his own expense, though the hiring should exceed the freight which remained to be earned by the first ship. But *Valin* admits, (and the con-

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Where the master, in case of necessity, hires another ship to carry on the cargo, the entire freight for the renewed voyage, is a lien on the cargo.

The master has no right to sell the cargo at the port of necessity, and then put an end to the adventure, if he can hire another vessel to carry the cargo to its destined port.

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cession is decisive on the point,) that if the hiring of another ship was a duty, and not a mere voluntary act on the part of the master, the excess of freight beyond the original amount agreed on (*pour l'excédent du fret convenu d'abord entr'eux et le maître*) would be at the expense of the owner of the cargo.

The royal declaration of *August, 1779*, charges the insurer of the cargo with the *extra* freight in such cases; (*surcroît de fret, s'il y en a*;) and this, in the opinion of *Emerigon*, gives the true spirit of the ordinance of 1681. The *French Code de Commerce*, No. 391. 393. adopts the regulations of the ordinances of 1681 and 1779, and declares, that if the ship becomes unfit for sea, the master is bound to use his best endeavours to procure another ship, and the insurer on the cargo is bound for the charges of unloading, storing, re-shipment, and *extra* freight. (*De l'excédent du fret.*) In addition to the weight justly due to these foreign writers and ordinances, on a question of marine law, we have an express decision upon the point, in the case of *Mumford v. The Commercial Insurance Company*, (5 *Johns. Rep.* 262.) It was there held, that the insurer upon the goods must pay the increased freight arising from the necessary change of the ship. This decision settles the law here, and shows that the claim of the plaintiffs to a *lien* on the goods for the freight from *Fayal*, was well founded. If the cargo was chargeable, under the contract of the master, with this new freight, there can be no doubt that the plaintiffs were entitled to retain possession of the goods until the freight was paid.

It might require some consideration, before the master, to settle the amount of freight which is to be paid in these cases of a change of ship; but the parties before me seem to agree that the only point in dispute between them is, whether the original or the new freight should be demanded and paid. I understand from the *French* books, that the *extra* freight means the surplus beyond what the freight would have been

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by the original charter-party, if no necessity of hiring another ship had intervened. The owner of the goods is not responsible for the old and the new freight united. The first ship did not earn, upon any principle, more than a rateable proportion of the original freight, because she performed only a part of the voyage; and it might well happen, if the freight up to the port of necessity was accurately and justly apportioned, that the hire of the new ship might not amount to more than the portion of the original freight which remained to be earned by the first ship. The maritime law of France gives a rateable freight, in all cases of a loss of voyage by *vis major*, for the goods brought to an intermediate port; and, therefore, the ordinances contemplate the case of a re-shipment without any excess of freight beyond the original contract. (*Surcroit de fret, s'il y en a.*)

In the present case, only part of the cargo was preserved and brought to its place of delivery, and therefore freight was due only for the goods that were brought, because, unless there be a very special and precise agreement to the contrary, freight is only due under the original contract, in proportion to the amount of the goods delivered. (*Abbot, p. 244. Pothier, tit. charte-partie, n. 67, 68. Frith v. Barker, 2 Johns. Rep. 327.*) To ascertain the amount of the extra freight in this case, upon the principles of the French law, I apprehend we ought to see what would be the difference between the amount of the freight under the original charter-party, for the portion of the cargo delivered at New-York, and the amount of a rateable freight to Fayal, for the goods saved, added to the freight of the new ship. That difference being in this case much greater than the original freight which would have been to be paid, if the first ship had been able to come on, would show the excess of freight incurred in this case by the defendants, as owners of the cargo. But any attempt at an estimate of this kind becomes unnecessary, because the original contract is considered as dissolved, and all claim for freight under it is abandoned by

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the plaintiffs. They claim only the new freight from Poyet to New-York, and the defendant is willing to pay, under the original contract, as though there had been no change of the ship.

The motion to dissolve the injunction must accordingly be denied, except upon the condition of bringing into Court the freight charged in the bill, with interest thereon from the time the plaintiffs were dispossessed of the goods.

Order accordingly.

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R. TROUP against W. WOOD and S. SHERWOOD.

Where a judgment and execution, which had been fully paid and satisfied, were kept on foot by the assignees of the judgment, fraudulently, for the purpose of speculating on the property of the debtor, of which the defendants, assignees or owners of such judgment, became purchasers at a sheriff's sale, they were decreed to execute a release of all their title and interest so acquired, to the owners of the lands so fraudulently sold in execution, and to deliver up the possession thereof, and to pay the rents, and profits, and damages, for any waste committed, with all costs, &c.

A judgment, after it has been fully paid, cannot be kept on foot to cover any new demands of the plaintiff.

It seems, that a person convicted of felony, and sentenced to imprisonment in the state prison for life, is *civilitur mortuus*. Therefore, writs of *scire facias*, issued to such convict, and not to his legal representatives, or terre-tenants, to revive a judgment against him, and *nihil* returned thereon, can have no legal operation or effect whatever.

An agreement by the owner of an execution, on which lands to an amount in value far exceeding the debt had been raised, to prevent the usual competition at the sheriff's sale, and in order to leave a

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balance due on the execution, for the purpose of having lands of the debtor, in other counties, seized and sold, is fraudulent. And the execution is deemed, in law, satisfied.

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Where the sheriff seizes sufficient property of the debtor, under an execution, the debtor is discharged from the judgment, and the plaintiff must look to the sheriff for his money.

THE bill, filed in July, 1812, stated, that the plaintiff was seised in fee of lot No. 33, in *Lysander*, in *Onondaga* county, and of lot No. 76, in *Solon*, in *Cortlandt* county, which he purchased, in 1792, *bona fide*, and for a valuable consideration, of *Henry Platner*. That the plaintiff took possession of the lots, and continued in the enjoyment thereof, until disturbed by the defendants. That in April term, 1787, *Abraham Bachman* obtained a judgment against *H. Platner*, in the *Supreme Court*, for 773 pounds, debt, and 6 pounds 18 shillings, costs, and the judgment was docketed the 16th of April, 1787. The plaintiff, when he purchased the lots, was ignorant of the judgment. That *Bachman* and *Platner*, having had various dealings together, before and after the judgment, came to a settlement of their accounts on the 4th of July, 1798, in which settlement, the judgment was included; and a considerable balance was found due to *P.* from *B.*, for the payment of which he executed a bond to *P.* on the same day. That on the settlement, a receipt in full for the judgment was given by *B.* to *P.*, which receipts, together with other receipts for previous payments on the judgment, came to the hands of *Charles Vincent*, the son-in-law of *P.* who had access to his papers; shortly after the imprisonment of *P.* That *C. V.* delivered the receipts to *B.* or to *Jacob F. Miller*, his executor, or to *Jacob R. Van Rensselaer*, after the death of *Miller*. That satisfaction of the judgment was neglected to be entered on record. That *P.* was convicted of forgery, in June, 1790, and sentenced to the state prison for life, and continued in prison until the 10th of June, 1806, when he was

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pardoned. That in *October* term, 1799, the judgment was fraudulently revived by two writs of *scire facias*, returned *nihil*, and which were issued by *B.*, or by some other person, with his privity, both of them well knowing that the judgment was satisfied. That in the vacation following *October* term, *B.* or some other person, with his privity, issued a *test fi. fa.* on the judgment, to the sheriff of *Ontario* county, who sold, as the property of *P.*, three lots of land, and part of another, containing above 841 acres of land, for 332 dollars and 25 cents. That *B.* having died soon after the execution had issued, the judgment was fraudulently revived, in the names of *George Monell*, *Jacob F. Miller*, and *Catharine Bachman*, as executors of *B.*, in *October* term, 1800. That *Monell*, soon after the revival of the judgment, being informed that the judgment had been satisfied, refused to be concerned in any further proceedings upon it, and requested of *Miller* an indemnity for all claims against him as executor, which *Miller* gave to him, accordingly. That *Miller*, afterwards, well knowing that the judgment had been satisfied, fraudulently sold and assigned it to *Jacob R. Van Rensselaer*, for some trifling consideration. That *Van Rensselaer*, before he took the assignment, knew, or had grounds to believe, or suspect, that the judgment had been satisfied. That he, afterwards, as assignee, in the vacation after *October* term, 1802, fraudulently issued a *test fi. fa.* on the said judgment, to the sheriff of *Delaware*, requiring him to levy 689 dollars and 48 cents, as the residue of the judgment. That the sheriff seized several lots in *Delhi*, owned by persons deriving title from *P.*, who, in order to protect themselves, agreed with the defendant, *Samuel Sherwood*, either as agent of *J. R. Van Rensselaer*, or as having an interest in the judgment, that the sheriff should set up their respective lots for sale, and the owners purchase them for some trifling consideration, and receive deeds from the sheriff, and that the owners should be responsible for the



payment of the 689 dollars and 48 cents, in proportion to the quantity of land owned by them respectively; that the greater part of the said sum should be immediately paid, and for the balance, an execution should issue for the sale of the lands in the military tract, and if they failed to produce the balance, the owners of the said lots should pay it in the proportions above mentioned. That the defendant S., who had the entire direction of the sale, either as agent, or as having an interest therein, procured the sheriff to assist in carrying the agreement into effect; and he, accordingly, sold the lots to the owners thereof, for trifling sums, executed deeds to them, and returned on the execution, that he had levied 402 dollars and 80 cents, and that *Platner* had no other lands, &c, on which to levy the residue. That the said owners of lots paid the greater part of the 689 dollars and 48 cents under the agreement; and for the residue, several other writs of *test. fi. fa.* were fraudulently issued for the sale of lots in the military tract. That the defendant S., at the time of the said sale, had notice, or had ground to believe or suspect, that the said judgment had been satisfied before issuing the said execution to the sheriff of *Delaware*; but conceiving the design of a fraudulent and profitable speculation, owing to the situation of *Platner*, by overreaching, by means of sales under the judgment, titles derived from P., and by selling the remainder of the lots owned by him for nominal prices. That in pursuance of such fraudulent design, the defendant S. made the said agreement, and procured it to be carried into effect; and proposed to the defendant W., who resided on the military tract, to be concerned with him in the purchase of lands in that tract. That the defendant W., with notice of this corrupt and fraudulent design of the defendant S., fraudulently agreed to the proposal, and the two defendants associated accordingly for that purpose. That the defendants then procured from *J. R. Van Rensselaer*, or some other person, an assignment of the said judgment, for a trifling sum, but

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with notice to both, or with grounds to believe, or suspect, that the judgment had been satisfied. That the defendants, as assignees of the said judgment, and in prosecution of their corrupt and fraudulent design, in the *November* vacation of the Supreme Court, in 1803, fraudulently caused a *test. fi. fa.* to be issued to the sheriff of the county of *Cayuga*, and delivered to a deputy of the sheriff, (*P. Hughes*,) without his knowledge. That the sale under the execution was entirely under the direction of the defendants, or one of them; and by artful and corrupt practices between them and the deputy sheriff, the latter, without the privity of the sheriff, sold to the defendant, or to some other person for their use, above *forty* military lots, of great value, and which had been levied on as the property of *Platner*, for *eleven dollars and twenty-eight cents*. That the execution was returned by the deputy, in the name of the sheriff, and without his privity; and the return mentioned the lands and tenements generally, without designating the lots. That the defendant *W.* then applied to the sheriff to execute a conveyance for the lots, which the sheriff refused to do; and the defendants took a deed from the deputy sheriff, which was fraudulently executed by him. That the defendants, in further prosecution of their corrupt and fraudulent design, in the *May* vacation of the Supreme Court in 1806, fraudulently caused another *test. fi. fa.* for the residue, to be issued to the sheriff of the county of *Onondaga*. That the sheriff sold to the defendants, or to some other person, for their use, and executed a deed for divers military lots, seized as the property of *Platner*, for *eighteen dollars and fifty-two cents*, and among which were the two lots above mentioned, belonging to the plaintiffs. That the sale was fraudulently conducted by the sheriff, who, in his return to the execution, speaks of levying on lands generally, without designating the lots sold. That the defendants, as assignees aforesaid, in further prosecution of their corrupt and fraudulent design, in *February* vacation of the Supreme Court in 1807, fraudulently issued

another test. *fi. fa.* to the sheriff of the county of Seneca, under which execution the sheriff sold to the defendants, or to some other person for their use, divers military lots of great value, seized as the property of *Platner*, for twenty-five dollars and forty cents; that the sale was corruptly conducted by the sheriff, who returned a levy on the lands generally, without designating the lots. That the defendants, under cover of their fraudulent deed, had taken possession of the two lots belonging to the plaintiff, by procuring an attornment from the person in possession. That the plaintiff was ignorant of the said judgment, or of any proceedings thereon, until he was so fraudulently dispossessed of the said lots. The plaintiff prayed, that the defendants might be decreed to quiet his title to the said lots, by executing to him a release of their pretended interest in the same; and be decreed to deliver up the possession thereof to the plaintiff. The plaintiff offered to pay the principal and interest of what the defendant gave for the lots, and the costs and charges of the execution and sale, if, in equity, the same could be demanded.

The defendant, *Samuel Sherwood*, in his answer, filed December 12th, 1812, admitted, that he had seen a deed on record from *H. Platner* to the plaintiff, for the two lots above mentioned. That he believed that *A. Bashman* obtained a judgment, as stated by the plaintiff. That he never knew or heard that the judgment was satisfied, in whole or in part, except so far as it was satisfied by executions issued under it. That while he acted as agent of *J. R. Van Rensselaer*, and superintended the sale in Delaware county, in 1808, *Stephen Hogeboom*, who attended that sale, suggested that the judgment was satisfied, but as his lands were sold under the execution, and he became a purchaser, the defendant *S.* placed no confidence in the suggestion. That *Jacob R. Van Rensselaer* always assured this defendant that the same was a just subsisting judgment, and in no wise satisfied or paid, except by the collections on the executions.

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That the defendant knew nothing, nor has he heard of the bond or receipt said to be given by *Abraham Bachman* to *H. Platner*, nor does he believe any were ever given. The defendant admitted that *H. P.* was convicted, imprisoned, and pardoned, as charged; that the judgment was revived by the executors of *A. Bachman*, in 1799 or 1800, but he did not recollect whether he ever knew or heard of any other revival. He denied any knowledge or suspicion that the judgment was fraudulently revived. That a *test. fi. fa.* issued upon the judgment to the sheriff of *Ontario*, but what lands were sold the defendant did not know. That he believed the sum made upon such *test. fi. fa.* was 132*l.* 18*s.* (332 dollars 25 cents.) That he always believed that the execution issued, by direction of the plaintiff, to collect a just and subsisting debt. That he does not know whether the judgment was revived by the executors of *B.* before or after the execution to the sheriff of *Ontario*, though he always supposed it was before. That he never knew or heard of the refusal of the executor, *G. Monell*, or of the indemnity to him, That he had understood from *J. R. V. R.* that the judgment was assigned by the executors of *B.* to him, on the 4th of *December*, 1802, and that he then allowed on his accounts, and paid them, in cash, 275*l.* 15*s.* 10*d.* (689 dollars and 48 cents,) being the balance then due upon the judgment; and that the transaction was fair, without any knowledge or just ground to suspect that the judgment was satisfied. That in *October* vacation, 1802, a *test. fi. fa.* for the residue, was sent to the sheriff of *Delaware*, and the indorsement on the execution was to levy 275*l.* 15*s.* 10*d.* with interest on 248*l.* 14*s.* 2*d.* That the defendant was constituted by *J. R. V. R.* his agent, with written directions to attend the sale, and without any interest therein. That the sheriff was directed to sell the right of *H. P.* to lots No. 10. 20. and 40. in *Whitesborough* patent, in *Delhi*, (except such parts thereof as were possessed by *Levi Baxter*, *William Reside*, *Joseph Denio*, and *George Fisher*, who were then ac-

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tral settlers thereon,) with a view that the execution should be satisfied, by the sale of wild lands in the hands of those who had purchased for speculation. That the settlers not being apprized of this direction, or not assenting to it, agreed with *Stephen Hogeboom*, the owner of the wild land, that they and he were to pay their proportions of the execution, according to the number of acres each held, or of the amount of sales, if it did not satisfy the execution. That the sale was duly advertised, and held at the court house, on the 18th of *April*, 1803. That the sale was proceeding when the defendant entered the room, the property of *Hogeboom* being up. That the sheriff agreed to delay the sale a few minutes, and propositions were made to the defendant, (then the agent of *J. R. V. R.*, and in no other manner interested,) for some terms, better than immediately paying the execution, as some of them had not in hand the necessary amount of money. That the defendant said, he had no authority to consent to any accommodation as it respected *Hogeboom's* land, but was authorized to accommodate the settlers. That the interval of the sheriff's delay lasted twenty minutes, during which time it was agreed between the defendant and the settlers, (excluding *Hogeboom*,) that instead of paying up the execution and discharging the judgment, they might become purchasers of it, and take an assignment, so that if any property of *H. P.* could afterwards be discovered, they might be reimbursed. That the settlers then took the direction of the sale, and the sale of *Hogeboom's* land was continued, and was struck off to him, under the previous agreement between him and the settlers, for the amount supposed to be his proportion. That the settlers, understanding that a sale under this judgment would protect their lands under younger judgments, chose to have their lots sold, and they were sold, and each owner became a purchaser. The lands of the four settlers named, amounted to 684 acres, and the land of *Hogeboom* was 856 acres, and the amount due on the execution, including sheriff's fees,

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was 706 dollars and 62 cents. That in pursuance of his agreement with the settlers, he, as agent, received of the sheriff and of the settlers, 695 dollars and 51 cents in cash, or a note equal thereto. That he detailed the transaction to *J. R. V. R.* and requested an assignment of the judgment to *Levi Baxter*, for the benefit of the settlers. That 695 dollars and 51 cents was the amount of the execution, with interest up to the day of sale. That the amount for which the judgment was to be assigned was 292 dollars and 70 cents. That *J. R. V. R.* assigned the judgment to *Levi Baxter*, the 3d of June, 1803, in consideration of 297 dollars and 77 cents, until which time the defendant had no interest in the business, except as agent. That the sheriff executed deeds to the purchasers, and he probably drew them. That the lands so sold would, at that period, if uncultivated, have been worth from three to eight dollars an acre. That the defendant supposed the reason why the lands were not bid higher was, that no person present was disposed to make the settlers pay more than they were obliged to, or to reduce the balance, which by their purchase of the judgment they might obtain from the property of *H. P.* That he thinks it probable the sheriff returned on the execution that he had levied 402 dollars and 80 cents, as that was the sum made by him on the sales, besides his fees. That soon after the assignment of the judgment, the four settlers named called on the defendant to make arrangement to collect the balance due on the execution out of the property of *H. P.* That it was agreed between them and the defendant, that he should become their agent, in collecting the balance, for a reasonable compensation. That the defendant commenced an inquiry, and ascertained that *H. P.* owned military titles, and he suggested that it would be best for them to purchase in the title of *H. P.*, supposed to be precarious, and by risking the title of several lots, they might get some good ones. That objections were made, and it was finally agreed between *Baxter* and the defendant, that they would hazard

that risk, and the other defendants agreed to accept whatever was made out of the sales upon the execution, according to their shares. That this defendant then proposed to the defendant *W.* that if he would engage in the risk, and attend to the sales, any purchases made under the same should accrue to the benefit of him and the defendant, and *Levi B.*, in equal shares. That the defendant *W.* agreed, and the defendant then caused a *test. fi. fa.* to be issued to the sheriff of *Cayuga*, on the 20th of *December*, 1803, and sent it to the defendant *W.* That the defendant *W.* informed him that a sale was advertised for the 5th of *March*, 1804. That this defendant attended the sale. That he had no interest in the judgment in contemplation, when the assignment was made to *L. Baxter*, and that the assignment was made solely with a view to collect the balance out of the property of *H. P.* That the execution was not delivered to a deputy of the sheriff of *Cayuga*, with a design to conceal it from the sheriff. That the sale in *Cayuga* was in a tavern, in *Scipio*. That a number of persons were present, of whom the defendant named four. That several persons bid. That some lot or lots were struck off to *Joshua Patrick*, to *Benjamin Tucker*, and *Eleazar Burnham*, and all or the greater part of the remainder to the defendant *W.* That the lots were set up separately, and the persons present seemed to suppose *Platner's* title spurious, and were not willing to bid. That the lot struck off to *Ebenazer Burnham* was intended for the defendant *W.*, this defendant, and *Levi B.* That a deed was drawn by the defendant, and executed the next day, by the deputy, in the name of the sheriff. That twenty-five lots, lying in twelve different towns, (the number of each lot, and the towns, being mentioned,) were sold for ten dollars and one cent. That nothing was said, at the time of the sale, touching the judgment, or the amount due upon it. That he drew, for the deputy, the return on the execution. That the defendant, on his return home, informed the proprie-

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tors of the assignment, of what had been done, and offered then to take his share of the purchase, and they to allow him for his trouble and expense, which they declined. That the defendant then bought out their respective shares, and allowed them the principal and interest of them respectively. That on the 21st of *October*, 1812, he bought in the share of *Levi Baxter*, so that he is now sole owner of the balance due on the judgment. That a *test. fi. fa.* for the residue, was issued to the sheriff of *Onondaga*, and this defendant, and the defendant *W.* attended the sale, on the 15th of *October*, 1806. A number of persons were present. The deputy sheriff sold the right of *H. P.* to twenty-two lots in eleven towns, (all mentioned,) and they were purchased for the benefit of the defendant, and the defendant *W.*, and *Levi Baxter*. Each lot was sold separately, and no lot brought more than three or four dollars. Nothing was said, at the time of the sale, relative to the judgment, or the amount due thereon. That the sale was fair and legal. That the defendant drew the return to the execution, and the deputy sheriff executed a deed. The two lots of the plaintiff were included in the sale or the deed. That in *February* vacation, 1807, a *test. fi. fa.* for the residue, was issued to the sheriff of *Seneca*, and a sale took place, and the defendant *W.*, and *Levi Baxter*, were present, and a number of lots (eleven) were sold for the benefit of themselves and this defendant, and all the proceedings were fair and legal. That in *October*, 1807, the defendant *W.* took possession of the two lots of the plaintiff, under claim of title, and has exercised acts of ownership ever since. That the defendant does not claim title to the two lots of the plaintiff, under the deed of the sheriff aforesaid, or in pursuance of the sale, in *May* vacation, 1806. That he claims title to the said lots by virtue of a sale, by the sheriff of *Onondaga*, under the said judgment in *May* vacation, 1807, to the three associates, and by virtue of a release from the defendant *W.*



and *Levi B.*, on the 30th of *September*, 1812, of all their right and title. The defendant admitted he received a letter from the plaintiff, dated the 7th of *December*, 1811, demanding a release of his claim to the two lots of the plaintiff, and that the defendant did not answer the letter. That if the plaintiff will bring an ejectment, the defendant will stipulate not to introduce, in his defence, any title whatsoever, derived under the said judgment. That this suggestion is not made, because the defendant is apprehensive that a title derived under the said judgment is not good; but because he is satisfied that the plaintiff never had any title to the two lots he claims.

The answer of the defendant *Walter Wood*, filed the 30th of *November*, 1812, stated that he did not believe that the plaintiff was ever seized of the two lots. He admitted his purchase of *H. P.*, as stated, and the judgment of *Abraham B.* He said that he knew nothing of any satisfaction of the judgment, except by the executions and sales, and believed it to have been a good and subsisting judgment. That he did not believe any such receipt existed, as stated in the bill; and that he understood the executors of *B.* revived the judgment. He did not believe that it was fraudulently revived. That he knew nothing of the *Ontario* execution. That he believed the judgment was assigned to *Jacob R. Van Rensselaer*, for a fair and valuable consideration. That he knew nothing of the *Delaware* execution. That in 1807, the defendant *S.* informed him of the judgment, and that it was assigned to *Levi B.*, and that there was a balance, which the defendant *S.*, and *Levi B.*, wished to collect, and proposed, if the defendant would engage in the risk of eventually obtaining title, that the purchases should be for the joint benefit of the three, and he agreed to the proposal; and a *test. fa. fa.* was issued to the sheriff of *Cayuga*. That he believed the balance appearing was justly due, and he delivered the execution to the deputy sheriff in *Scipio*. That the execution contained an indorsement, to levy 292 dollars 70

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cents, and interest. That there was no design of secrecy in the defendant, and that he believed all was fair. That he searched the clerk's office, and believed that many of the *Platner* lots were worth attention, and might "become beneficial to themselves." That his hopes have been, in a degree, realized. That the sheriff's sale was on the 5th of *March*, 1804, and duly advertised, and the lots, (naming them,) were sold separately, and bid off for the benefit of the three associates. That a number of persons attended, besides the two defendants. That no conversation was had, as he recollects, at the sale, relative to the judgment or the monies due. That the deed was executed by the deputy, on the day of the sale, to the three associates. That the sheriff (*Hughes*) did execute a deed to *Benjamin Tucker*, for lands purchased at such sale. That an execution on the judgment was issued to the sheriff of *Onondaga*, on which he was directed to levy 281 dollars 42 cents, and interest; and a sale was duly advertised, and took place on the 15th of *October*, 1806. That a number of persons were present. That the plaintiff *S.*, and *Levi B.* were also present. That the sale was by the deputy sheriff, and a number of lots were sold, (naming them,) separately. The deed was executed, on the same day, by the deputy, to the three associates. That a lot sold for above four dollars. That the persons present were deterred from buying, from an opinion that *Platner's* title was bad. He recollected no conversation, at the sale, relative to the judgment, or the amount due. That he believed every thing was fair and legal. That the two lots of the plaintiff were not sold. That a *test. fi. fa.*, for the residue, then issued to the sheriff of *Seneca*, in *February* vacation, 1807, and a sale was made on the 25th of *May*, 1807, and eleven lots, lying in five towns, (naming them,) were sold, and bid off by the defendant, and *Levi B.*, and a deed was given by the sheriff to the three associates. That several persons attended the sale, and bid. The price of all the lots was twenty-eight dollars. That soon after this last sale, *Benjamin Tucker* in-

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stated that the judgment had been paid and satisfied. That he did not believe in the suggestion. That in *October, 1807*, he took possession of the two lots of the plaintiff, and continued in possession to the 30th of *September, 1812*, and exercised ownership, and then sold them to the defendant *S.* and received an indemnity. The defendant admitted that he received a letter from the plaintiff, in *December, 1811*, requiring a release, and that he did not answer the letter. He admitted that he gave the agent of the plaintiff a memorandum, stating, among other things, that on the 7th of *September, 1807*, the sheriff of *Onondaga* sold to the three associates, the two lots of the plaintiff aforesaid. That these two lots, with others, were purchased at the sheriff's sale, under the said judgment, on the 7th of *September, 1807*.

Replications having been filed to these answers, numerous witnesses were examined, and much evidence given on both sides; but the material parts of it being noticed by the Chancellor, in his opinion, it is unnecessary to detail it here.

The cause was argued by *Henry and Van Baren*, for the plaintiff; and by *Van Vechten and E. Williams*, for the defendants. Nov. 10th and 12th, 1819.

The cause stood over for consideration to this day. Jan. 4th, 1820.

THE CHANCELLOR. The prayer of the bill is, that the plaintiff be quieted in his title to two military lots, which the defendants caused to be sold under a dormant judgment, against *Henry Platner*. The charge is, that the judgment was satisfied long before the sale, and that it was kept on foot by fraud, and made subservient to a scheme of fraudulent speculation on the part of the defendants.

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The judgment was entered up in 1787. The sale of the two lots claimed by the plaintiff, was in 1807, and was the last and closing act of a series of transactions, in which real property, lying in five different counties, estimated at upwards of 134,000 dollars, at the time of the sales, and upwards of 409,000 dollars at the time of taking the testimony, was sold for less than 800 dollars, to satisfy a judgment originally for a debt of less than 1,000 dollars, and which had been avowedly reduced considerably below the original sum when the first execution issued.

It is contended, on the part of the plaintiff, that there are several periods in the history of the case, at each of which the acts that occurred amounted to a satisfaction and discharge of the judgment, and that every subsequent step which was taken, was an act of premeditated fraud.

1. It is said, that the judgment was satisfied by a settlement between *Bachman* and *Platner*, the original parties, in *August*, 1798.

The judgment of *B.* against *P.* was satisfied by the settlement between the parties in *August*, 1798.

*Henry Platner* was examined, being made a competent witness by a release from the plaintiff. He says, that there had been various dealings between him and *Bachman*, who was a merchant, and a neighbour of his, between the date of the judgment and 1797, when they came to a partial settlement. That in *August*, 1798, they came to a final settlement, and there was a considerable balance due *Platner*. That *Bachman* then gave him a receipt in full, as well of the judgment as of all other accounts and demands. That as *Bachman* was then bail for *Platner*, and wished some indemnity, it was agreed that the balance, being above 400 dollars, found due to *Platner*, should remain unsatisfied. *Charles Vincent*, son-in-law of *Platner*, another witness, who was present at the partial settlement in 1797, and kept several receipts in his possession belonging to *Platner*, testifies, that in *August*, 1798, *Platner* gave him the receipt in full above mentioned, and a few days thereafter he saw *Bachman* and *Platner* together, and the receipt in full of the

Judgment, was admitted by *Bachman*. That at that time *Bachman* suggested, that he still might want the judgment to cover him as a security for being bail for *Platner*.

These two witnesses thus prove, that the judgment was satisfied, by the act and acknowledgment of the parties, in August, 1798. They concur as to the circumstances attending the partial settlement the year before, and from them it would appear, that though the balance on the judgment was 252 pounds, yet that *Bachman* assumed or acknowledged several debts which would, when adjusted, leave a considerable balance in favour of *Platner*, and the adjustment of these debts in 1798, left the balance, already mentioned, in favour of *Platner*.

If this receipt in full had been produced, it would have silenced this controversy, in the first instance, but the non-production of it is accounted for in the following manner :

*Platner* admits that he gave his receipts, which were produced at the partial settlement, to *Vincent* to keep, but he thinks the receipt in full was retained in his own possession, and he does not account for the loss of it. But *Vincent* says, *Platner* gave it to him to keep ; and this is the more probable account, as *Vincent* had been the depository of the former receipts. He says, that *Bachman* repeatedly urged him to surrender up that and the other receipts to him, as he wanted to use the judgment as his indemnity for becoming bail for *Platner*. It is to be observed, that *Platner* was about this period overwhelmed with misery and ruin, being early in June, 1799, convicted of forgery, and sentenced to imprisonment in the state prison for life, where he continued, until pardoned in 1806. This will very easily account for the dispersion of his papers ; and this calamity afforded facility and temptation to the plunder of his estate. *Vincent* says, that *Bachman* became so importunate, that in June, 1799, (being the very time of the conviction of *Platner*,) he delivered the receipts to *John Shafer*, and requested him to take and preserve copies, which he did ; and in Septem-

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ber, 1799, he surrendered up all the originals to *Bachman*, who died a few weeks afterwards.

*Platner* and *Vincent* were both of them, at the period of 1799, men of bad credit. The former has, however, considerably regained the forfeited esteem of his acquaintance; and the intrinsic probability and apparent candour of their story, is corroborated by facts derived from other and unquestionable sources.

*Shafer* confirms the fact of having the original receipts delivered to him by *Vincent*, and one of them purported to be a receipt in full from *Bachman* to *Platner*, as well of the judgment as of all demands. He says, *Vincent* wished him to keep the originals, but owing to the conviction of *Platner*, he was afraid of difficulty, and refused, and only consented to keep copies, which he took, and then returned the originals to *Vincent*. He says, he had seen the handwriting of *Bachman*, and he believed the receipts to be genuine. The copies he took were called out of his hands by *Vincent* in September, 1799, about three months after they had been taken; and *Vincent* says, this was done at the solicitation of *Bachman*, who required the possession of them. The character of *Shafer* is not impeached. *Abraham Vincent*, a brother of *Charles Vincent*, and who lived with him in the spring of 1799, says, he saw in his possession a receipt, purporting to be given by *Bachman* to *Platner*, in full of the judgment, and of all demands. That he was well acquainted with the handwriting of *Bachman*, and knew the signature to be his. He read it, and recollected the contents of it distinctly.

When the copies of the receipts were returned to *Vincent*, *Shafer* took a receipt in these words: "Received of Major John *Shafer*, a copy of sundry receipts of *Abraham Bachman* to *Henry Platner*, Sept. 10, 1799." This receipt is proved as an exhibit in the cause, and it gives peculiar force to the other testimony.

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Other proof, in corroboration of the satisfaction of the judgment, is derived from the testimony of Ch. J. *Spencer*: He states that he recovered a judgment against *Henry Platner*, in *April*, 1797, and believing this old judgment of *Bachman* was satisfied, or kept on foot by fraud, to protect *Platner* from creditors, (for *Bachman* and *Platner* were connected by marriage, and intimate) he applied to *Bachman*, and demanded as a matter of right, that he should release his lien under that judgment, to the lands of *Platner*, to the value of 5,000 dollars, in *Claverack*, where *Platner* and *Bachman* resided. That *Bachman* gave the release without hesitation, and without consideration. The release is an exhibit, and is dated in *October*, 1797. He believed that *Bachman*, by that release, divested himself of all expectation of obtaining any satisfaction under the judgment; and that act of *Bachman* confirmed him in the belief that the judgment was satisfied, or fraudulent.

This fact is in corroboration of the testimony of *Platner* and *Vincent*, that the partial settlement in 1797, showed that *Platner* could not eventually be the debtor.

It is proved by *Henry Avery*, that he found among the papers of *Bachman*, after his death, several receipts given by him to *Platner*, and which are exhibits in the cause. How came *Bachman* by these receipts, unless, upon a final settlement, the parties considered their dealings and demands as closed, or unless *Bachman* repossessed himself of all the vouchers he had given, in the manner stated by *Vincent*? *Platner* was, at that time, deemed dead in law, and forever separated from all the business or pecuniary concerns of this life.

*Jacob F. Miller* was present at the partial settlement in 1797, and he is said to have witnessed the receipt in full in 1798. He was one of the executors of *Bachman*, who revived the judgment, and gave it credit, as being valid and subsisting. He died in 1804, and we are deprived of any explanation which he might have given to the mystery of

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this transaction. *Vincent* admits, that after the death of *Bachman*, he was induced, by an offer of some of the property of *Platner*, to agree with *Miller* not to disclose his knowledge of the satisfaction of the judgment; and he says, that *Miller* showed him a bundle of papers of his testator, *Bachman*, and that among them was a full statement of the final settlement between *Bachman* and *Platner*, and upon which there appeared to be a considerable balance due to *Platner*. These papers he saw *Miller* destroy.

There is another exhibit in the cause, which is an item of some influence on this point. *Bachman*, on the 17th of *August*, 1798, gave a receipt to *Platner*, of a bond from *Joseph Denio* to *Platner*, on which was a considerable balance, which he promised, when collected, to pay in goods to two of the daughters of *Platner*; and *Platner* says, that on the final settlement, he deposited such a bond with *Bachman* for the benefit of two of his daughters.

Here, then, is the evidence in favour of a satisfaction of the judgment in *August*, 1798. We have four witnesses who all testify to the existence of a receipt in full of the judgment given by *Bachman*, and one of them satisfactorily accounts for its loss. In corroboration of the testimony of these witnesses, we have another fact, which shows, that *Bachman* could not, as early as *October*, 1797, have regarded the judgment as a valid, subsisting debt. We find, also, that he was in possession, and died in possession, of other receipts, which he had before given to *Platner*, and at the time of the final settlement, in *August*, 1798, he takes a bond due to *Platner*, to collect, as agent of *Platner*, and to appropriate the proceeds according to his direction. This mass of positive and circumstantial testimony satisfies me, that the judgment was settled and discharged in *August*, 1798; and if there was any understanding or arrangement between *Bachman* and *Platner*, that the judgment should remain as a security or means of indemnity to *Bachman*, for becoming bail to *Platner*, such an arrangement was, in judg-



ment of law, null and void. It is a sound and settled rule, that the penalty of a bond cannot be made to cover any other debt or demand than that specified in the condition. It would, as the Supreme Court observed, in *Bergen v. Boerum*, (2 *Caines*, 256.) be "against the very form of the contract, and liable to great abuse. It would be a deception on the world, for the condition, which is to discharge the judgment, is on record. If, therefore, it was to reach other demands, it would be impossible to know what would satisfy the debt." There could not be a more dangerous, and there is certainly not a more inadmissible pretension, than that the parties to a judgment may keep it on foot, after the original debt has been paid, to meet and cover new and distinct engagements between them. But the parties have never acted upon any such agreement, for the executors of *Bachman* have only claimed what they assumed to be the balance on the judgment.

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The penalty of a bond cannot be made to cover any other debt or demand than that mentioned in the condition.

Nor can a judgment after the original debt has been fully paid, be kept on foot to cover new and distinct engagements between the parties.

If the judgment was satisfied in 1798, it must have been fraudulently revived by *Miller*, the responsible and acting executor of *Bachman*; and whatever validity may be attached to *bona fide* purchases by third persons, under executions issued upon the revival of the judgment, yet the owners of the judgment ought not to be permitted to derive any benefit from such sales, and every assignee of the judgment took it, and made purchases under it, at his peril.

2. If, however, there was a balance due upon the judgment, at the time of the conviction of *Platner*, the judgment was not revived in 1800, either with the formalities required by law, or with the notice that justice and equity required.

*Platner* was convicted of a felony in *June*, 1799, and sentenced to imprisonment in the state prison, at hard labour, for life. The act of the 29th of *March*, 1799, declared, that all such convicts for any felony *thereafter* to be committed, should be deemed to be civilly dead, to all intents

It seems, that a person convicted of felony and sentenced to imprisonment for life in the state prison, is *civiliter mortuus*.

And, therefore, writs of *scire facias* issued to such convict in prison, and not to his legal representatives, or terre-tenants, to revive a judgment, and two *nilis* returned thereon, can have no legal effect or operation.

*scire facias* issued to such convict in prison, and not to his legal representatives, or terre-tenants, to revive a judgment, and two *nilis* returned thereon, can have no legal effect or operation.

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and purposes. The record of *Platner's* conviction is not produced, or cannot be found, and we do not know, therefore, with absolute certainty, whether the forgery of which *Platner* was convicted, was committed before or after the 29th of *March* preceding. The presumption is as fair, that it was committed after as before that period; and every presumption, in a case so extraordinary as this, ought to be turned against the party who has so abused the process of the law. But I apprehend, that the act of *March*, 1799, was only declaratory of the existing law, and enacted for greater caution. Lord *Coke* says, (*Co. Litt.* 130. a. 133. a.) that every person attainted of felony, or who is banished for life, or having committed felony, abjures the realm, is *extra legem positus*, and is accounted in law, *civiliter mortuus*. *Christian*, in his notes to 1 *Bl. Com.* 133. says, that if a person be convicted of treason or felony, and saving his life, is banished forever, this is a civil death; and so it is, also, if he receives sentence of death, and afterwards leaves the kingdom for life, upon a conditional pardon. When the new criminal code was enacted in *March*, 1796, changing the punishment of forgery from death into imprisonment for life, the legal consequences of the conviction, as to disability, must have remained the same. The party was incapacitated, forever, from discharging any of the civil relations, equally as if transported, or banished for life, or outlawed, or as if he had abjured the realm, or become a monk professed.<sup>(a)</sup> He was equally within the reason of the rule, declaring a party convicted of felony civilly dead. And we perceive, that the Legislature, in 1796, when they changed the punishment from death to imprisonment for life, seemed to be aware that the other common law consequences of the conviction would still follow, for they declared, by express provision, that no such conviction should work a forfeiture of property, real or personal.

(a) Vide *Matter of Deming*, 10 *Johns. Rep.* 282; and *Loflin v. Fowler*, 18 *Johns. Rep.* 336.

If this conclusion be correct, the *scire facias* which was directed to *Platner*, and to him only, ought to have been awarded to his representatives and to the terre-tenants. Two *nihilis* returned upon a *scire facias*, awarded against a party then under the execution of a sentence of imprisonment in the state prison for life, was a useless act, and of no force in law. And it affords a very unfavourable specimen of the spirit with which the judgment was revived by the representatives of *Bachman*, (one of whom, if the testimony is to be believed, was a witness to the final discharge of the judgment in 1798,) that no effort was made to give personal notice of the proceeding, to any one representative of *Platner*, or to any terre-tenant or purchaser holding under him the property sought to be charged. It wears very much the complexion of a fraud.

3, But, admitting the judgment was not satisfied before the death of *Bachman*, and was duly revived, it is next contended, that it was satisfied by the sales made in *Ontario*, under an execution issued at the instance of the executors of *Bachman*, and in *Delaware*, under an execution issued at the instance of *J. R. Van Rensselaer*, the assignee of the judgment.

According to a statement of the book account, and the balance due on the judgment, made out to the 17th of *April*, 1798, and which was taken from the papers of the estate of *Bachman*, the balance due to *Bachman*, at that time, on the judgment and book account, and other demands taken together, amounted to 252*l.* 3*s.* 10*d.* This was the statement and balance shown to *Jacob R. Van Rensselaer*, the first assignee of the judgment by *Miller*, the executor, as coming from the estate of *Bachman*; and *E. Gilbert*, the attorney of *Bachman's* executors, in respect to the revival of the judgment, states, in a letter to *Van Rensselaer*, (and which is an exhibit in the cause,) that *Miller*, the executor of *Bachman*, presented to him

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that sum, as being the balance claimed upon the judgment, in *April*, 1798. If we take that sum as the basis of calculation, (and the defendants do not pretend to any greater sum as being due at that period,) there was, after allowing interest on that balance, and after crediting the sum of 332 dollars 25 cents, raised by the sales in *Ontario* county, due to the estate of *Bachman*, on the 16th of *April*, 1803, (the day of the *Delaware* sales,) the sum of 464 dollars, and no more. The costs of entering up the judgment, in 1787, ought, probably, to be considered as having been included in the accounts and settlements between the parties; and that the 25*l.* 3*s.* 10*d.* was the *whole* demand that existed, at that time, against *Platner*. The judgment had been entered up eleven years before, and by an attorney, *Richard Sill*, who, as it is notorious, had been dead some years prior to the time that the balance was ascertained, in 1798. It is probable the costs of entering up that judgment had been paid by one of the parties to the attorney, and were included in the charge of book account. The balance, in 1798, was made up not only of the judgment debt, as one of the items, but of other debts and demands, and particularly of a large book debt on each side. After such a settlement of various accounts and demands, and including the judgment debt, it is not to be presumed that the costs of the dormant judgment were omitted, and the representatives of *Bachman*, who exhibited the balance upon that settlement, as the amount of their demand, ought to be precluded from claiming any sum beyond it. The presumption is, (and they ought to be concluded by it until it is destroyed by direct proof to the contrary.) that the costs of the judgment had been previously settled between the parties. Nor were any costs legally chargeable to the estate of *Platner*, upon the revival of the judgment by *scire facias*, for the judgment under that process, passed by default, without plea, and no costs were taxed or inserted in the *scire facias* record.

We may then safely conclude, that at the time of the *Delaware* sales, there could not have been more than 464 dollars due on the judgment. If we credit the 402 dollars 81 cents, being the acknowledged amount of sales in *Delaware*, there remained only a balance of 61 dollars 19 cents, unsatisfied, when the defendants became interested in the judgment, and sent executions, for the purpose of speculation, into several of the western counties of this state! Even, if we were to add to the balance so remaining unsatisfied, the costs of entering up the judgment, it would be only an addition to that balance of 17 dollars 34 cents.

*Van Rensselaer* purchased the judgment of *Miller*, one of the executors of *Bachman* on the 4th of *December*, 1802, for 296*l.* 3*s.* 11*d.* and he states that *Miller* claimed that sum, as being the balance due on the judgment, on the 14th of *November*, 1801. Upon what data such an estimate could have been made, does not appear; and we know that it could not have been correct, for the balance admitted by *Miller* to be due in *April*, 1798, with interest, and after deducting the *Ontario* sales, fell far short of that sum. *Van Rensselaer*, who had now become proprietor of the judgment, had already issued his execution to the sheriff of *Delaware*, by whom it was received on the 13th of *November*, 1802, and he added to the 206*l.* 3*s.* 11*d.* his own private demands against *Platner*, and thereby made the sum for which execution issued to be 275*l.* 15*s.* 10*d.* This addition to the execution was utterly unwarrantable; and to show in how loose and careless a manner the property of *Platner* was pursued, it is worthy of notice, that the *test. fi. fa.* issued in 1800, to the sheriff of *Ontario*, (as appears from the exhibit of the writ and its indorsements,) contained a direction, not only in the body of it, but by indorsement in the name of the attorney, to collect 772*l.* 8*s.* 8*d.* (the penalty of the bond,) besides costs and sheriff's fees. We have no evidence that the judgment had ever been even revived when this execution issued in the name of *E. Gilbert*, as attorney.

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But, if the 402 dollars 81 cents, raised upon the *Delaware* sales, did not entirely extinguish the judgment, there were circumstances attending those sales which must be admitted to have produced that effect.

The defendant *S.* says that he attended the *Delaware* sales, as agent for *Van Rensselaer*, the assignee of the judgment, and that the sales were at the court house on the 16th of *April*, 1803. That when the sheriff was commencing the sales, he entered, on behalf of *Van Rensselaer*, into an agreement with certain persons, who were settled upon lots advertised and set up for sale, by which, instead of paying up the execution, they might become purchasers of it, and take an assignment of the judgment, and, under it, pursue other property of *Platner*, that might afterwards be discovered. That the claimant of one tract of land was not included in this agreement, and he accordingly bid off that land for a sum which was, by a previous agreement between him and the settlers, deemed to be his proportion of the burden of the execution. The other persons bid only nominal sums, and took the direction of the sale, and received a title from the sheriff under the judgment. The real sum bid by one of those persons, and the nominal sums bid by the others, produced the sum already mentioned of 402 dollars 81 cents; this sum was produced upon a sale of lands proved to have been worth, at that time, upwards of 16,000 dollars, and, at the time the testimony was taken, upwards of 43,000 dollars. This arrangement left a balance remaining due upon the execution, according to the sum for which it was issued, of 292 dollars 70 cents, and that sum was to be considered as the price which the settlers were to pay for the purchase and assignment of the judgment. This agreement was ratified and carried into effect by *Van Rensselaer*; and in *June* following, the judgment was assigned to *Levi Baxter*, one of the parties to the agreement, for and on behalf of himself and the associates.

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*Erastus Root*, a witness present at the sale, says, that the defendant *S.* dissuaded bystanders from bidding, and proposed that the persons interested in the lots should not bid to the amount of their relative proportions of the judgment, but that they should *leave a balance due on the execution*, to be sent into the western part of the state to be satisfied, and by which the parties were to be indemnified. That a certain sum had been agreed to be left as a balance to remain due on the execution, to be sent to the westward, and the means used to prevent others bidding at the sale, arose from the arrangement made between the defendant *S.* and the settlers.

There is no essential difference between the answer of the defendant, and the testimony of the witness, in respect to the arrangement of the sale, except that the latter describes the intention of it, and the baneful effects of it, in more clear and explicit terms. The defendant says, he acted throughout the sale, as the agent of *Van Rensselaer*, and had then no interest in the judgment or sale; and it was not until the settlers had received an assignment of the judgment, that he entered into an arrangement with them to share the risk and profits of a speculating excursion with an execution into the western countries. He says, the settlers first applied to him to be their agent, to collect the balance, for a reasonable reward; and that having ascertained that *Platner* owned military titles, it was finally agreed that he should come in as a copartner in the concern, and share in the risk of acquiring some good titles to military lots. It was then that the defendant *S.* applied to the defendant *W.*, who resided in *Cayuga* county, and made a proposition to him, that if he would engage in the risk, and attend to the sales, purchases made under the same should enure to his benefit in equal proportion with the others; and to this proposition, the defendant *W.* says, he assented.

According to the testimony of *Root*, the defendant *S.* must have had an eye to the speculation, at the time of the sale,

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An agreement by the owner of an execution, with certain persons, to prevent the usual competition at a sheriff's sale, and in order to leave a small balance on the execution, for the purpose of seizing other property of the debtor, is fraudulent: and the execution is deemed, in law, to be satisfied, there having been lands seized on the execution, amounting in value to a far greater sum than the debt, and which, in consequence of such fraudulent agreement, sold for mere nominal prices.

for if he had remained only a disinterested agent of the owner of the execution, he would not have taken any part or interest in the arrangement between the settlers, but would have left them to satisfy the execution out of the immense property then under its power, by some equitable apportionment of it among themselves.

The question now occurs, is the owner of an execution to be permitted to enter into an agreement by which a fair sale under the usual competition is to be suppressed, and property, to more than thirty times the amount of the execution, sold for a nominal sum, in order to leave a balance to feed the execution, and enable it to sweep away property to an unmeasurable extent, in other counties? Such an agreement is against the policy of the law, dangerous to the rights of property, and fraudulent in its design. The creditor who suffers an execution, which the law lent him for his security, to be perverted to such a purpose, ought to be deprived of any further use of it. It is satisfied and cancelled by the force of such an act. This must be the necessary conclusion of law. It would be a violation of all principle, and a reproach to the administration of justice, to consider a small balance preserved under such circumstances, and for such uses, as a subsisting debt. As was truly observed, in the case of *Jones v. Caswell*, (3 Johns. Cas. 29.) "the law has regulated sales on execution with a jealous care, and provided a course of proceeding likely to promote a fair competition. A combination to prevent such competition, is contrary to morality and sound policy. It operates as a fraud upon the debtor, and his remaining creditors, by depriving the former of the opportunity of obtaining a full equivalent for the property which is devoted to the payment of his debts, and opens a door for oppressive speculation." By the interference and act of the owner of the execution, and by a combination between him and third persons, the property of *Platner* chargeable with the execution, is sold for nominal prices, and for the very purpose of pursuing and



sacrificing other property. This conduct ought to be deemed and adjudged a satisfaction of the execution. The sheriff seized sufficient property, and if it had been wasted or fraudulently sacrificed by the sheriff, the plaintiff would have had his remedy against him. When sufficient goods are seized by execution, the party can have no further remedy against the defendant, who is discharged by an adequate seizure. He must look to the sheriff. This is the just principle of law, which will not subject the defendant's property to satisfy the execution a second time. (*Clerk v. Withers*, 1 Salk. 322. 2 Ld. Raym. 1072.) Here it was not the sheriff, but it was the plaintiff himself, by his agent, who agreed that the property on which the execution was levied, should be sold for a nominal sum. Can it be possible that the plaintiff, or those who come in under him with knowledge of all these circumstances, shall be permitted to travel into other counties, and to hunt up other property with the execution? It is rarely that we meet with a more flagrant attempt at speculation under the forms of law. It was the pursuit of the property of a helpless and imprisoned convict, who had left his family in shame and misery. The plunder of the shipwrecked property of such a victim, was a hard and unconscientious act, which can never receive any countenance from this court.

The execution was, accordingly, satisfied and discharged, by the sales in *Delaware*.

4. But assuming that there did remain a balance, after these *Delaware* sales, from sixty to eighty dollars, legally due on the judgment, we are then to examine the conduct of the defendants at the *Cayuga* sales. They had now become the principal owners of the residuum of the debt, small indeed in amount, but mighty in mischief; and the *Cayuga* sales were under their special and immediate direction.

The defendant S. says, that an execution to the sheriff of *Cayuga* was sent by him to the defendant W., in *December*, 1803, and the property of *Platner* advertised for sale on the

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Where the sheriff seizes sufficient property of the debtor under an execution, the debtor is discharged from the judgment, and the plaintiff must look to the sheriff for his money.

Sales by the sheriff of *Cayuga*, under the execution, fraudulent and void.

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5th of *March*, 1804. The sale was held at a tavern in the town of *Scipio*, and the defendant *S.* attended in person from the county of *Delaware*, a distance, as travelled, of upwards of 100 miles. As he had already engaged the defendant *W.*, who resided on the spot, to attend the sales, such a journey, at such a season of the year, and when the sum remaining due, according to his own calculation, was only 110 dollars, is pretty good evidence that the real object of the sale was not the debt, but speculation. It is evidence, also, of the ardour and vigour with which that object was pursued.

At that sale, according to the answer of *S.*, some few persons (of whom he mentions four) attended, but the persons present seemed to suppose *Platner's* title spurious, and were unwilling to bid. He says, that nothing was said, at the time of the sale, touching the judgment, or the amount due upon it; and twenty-five military lots, lying in twelve different towns, were separately sold, for the aggregate sum of *ten dollars and one cent!* On the day following, the deputy sheriff who attended, executed a deed to the defendant *W.*, who purchased for the benefit of the defendants, and the four settlers in *Delaware* who were interested in the assignment of the judgment. After this sale, the defendant *S.* purchased in their respective interests in the execution, and the defendants and *Levi Baxter* remained the sole proprietors of the lands purchased. These twenty-five lots were worth in cash, at the time of the sale, under a good title, (and we have no evidence that *Platner's* title was not good,) 28,950 dollars, and on credit, 57,900 dollars; and in 1818, on credit, 173,700 dollars. The defendant *W.*, in his answer, gives the same account of the sale, and says that he had, previous to the sale, searched the clerk's office, and believed that many of the *Platner* lots "might become an object worthy of attention.\*" He says further, that after making the said purchases, he had been enabled, "agreeably to his original expectation, to have several of the lots settled, and the titles adjusted and quieted."

*Benjamin Tucker* appears to be a witness of very fair and unimpeachable credit, and he attended the *Cayuga* sales, and gives a more detailed account of the transactions that took place. He says, the place of sale was much more retired and secluded than other places in the same town, and that he attended to redeem a lot, and part of another lot, which were held under *Platner*, and were considered to be bound by the judgment. That he purchased in that lot, and the half of another, amounting, in the whole, to 900 acres, for a nominal sum, and that the defendant *W.* purchased all the other lots that were sold, and gave not more than a dollar, for each lot of 600 acres. That the defendants were not disposed to come to any terms of accommodation with him, in respect to his land; and after three or four lots had been sold, he declared, in the hearing of the defendants, that in order to save his lot, he would bid to the amount of the execution, on the next lot that was set up; that the sale was then stopped, at the instance of the defendants, and the witness was called aside by one of them, and told that they would not bid on his lot, if he would engage not to bid on any other lot; that he agreed to this proposition, and after some other lots were sold, the lots of the witness were set up, and he bid his land off, without opposition, for a sum less than two dollars, and took the sheriff's deed.

These facts are conclusive upon the case of the *Cayuga* sales, and show that they were a mere mockery of justice, and perverted to the total sacrifice of the rights of *Platner*. Comment upon them becomes useless. We cannot hesitate, for a moment, in pronouncing the whole proceeding an act of fraud. Here, also, if not before, the execution is to be deemed satisfied and discharged by the act of the party.

5. The defendants, however, giving credit on the execution for the sum of 11 dollars 28 cents, according to the sheriff's return, proceed next to the county of *Onondaga*.

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sheriff of *Onon-  
daga*, under  
the execution,  
fraudulent and  
void.

It seems their intemperate avidity for speculation was not capable of being satiated with success, nor cooled by time. The *Onondaga* sales were not made until the 15th of *October*, 1806. The balance then due had increased by the addition of interest, (according to an estimate on the part of the defendants,) to 117 dollars 6 cents. The defendant, *S.*, says, that he was present at the sales, and that twenty-two lots, lying dispersed in eleven towns, were sold by a deputy sheriff, and purchased in by the defendant *W.* That nothing was said, at the time of the sale, relative to the judgment, or the amount due thereon. The purchase money for these twenty-two lots, was 18 dollars 52 cents; yet it is in proof that the cash value of those lots, at the time of the sale, was 19,800 dollars, and on a credit, 31,600 dollars; and when the testimony was taken, 94,800 dollars, at a credit. The defendant *W.* gives the same account of these *Onondaga* sales, and says, that the deed was executed by the deputy, on the day of the sale, to the three associates, being the defendants and *Baxter*, and that the people were deterred from bidding, under an opinion that the *Platner* title was bad.

This is all the information touching these last sales, and the facts admitted speak for themselves.

Sales by the  
sheriff of *Seneca*, under the  
execution, also  
fraudulent and  
void.

6. The next epocha in the history of this case, is the sale in *Seneca* county, on the 25th of *May*, 1807. The defendant *S.* says, his two associates attended, and a number of lots were sold for the benefit of the concern. The defendant *W.* says, that 11 lots were sold for the benefit of the concern. The defendant *W.* says, that 11 lots, lying in five towns, were sold under the same judgment, and upon an execution issued for the remaining balance, and bid off by him and *Baxter*, for 28 dollars. According to an estimate, made by a witness, *Humphrey Howland*, those 11 lots were worth, in cash, at the time of the sale, 14,750 dollars, and on a credit, 29,500; and on a sale on credit, at the time he gave his testimony, 78,500 dollars.

But the cupidity of the defendants was still insatiable, and the two lots of the plaintiff, lying in the then county of *Onondaga*, were afterwards seized and sold. The defendant *S.* says, that he claims a title to those two lots by virtue of a sale by the sheriff of *Onondaga*, under the judgment, in the summer of 1807. The defendant *W.* is more precise as to the time, and says, that the sale was on the 7th of *September*, 1807, and that the two lots, claimed by the plaintiff, were, *with others*, purchased by the three associates, at such sale, under the aforesaid judgment of *Bachman*. He says, that in *October* following, he took possession of the two lots, as owner; and afterwards, on the 30th of *September*, 1812, sold them to the defendant *S.* On the same day, according to the answer of the defendant *S.*, *Baxter*, also, released his right to these two lots, so that the defendant *S.* is now the sole owner under the judgment title. He shows no other title, nor does he pretend to any other, and declares that he entertains no apprehension that the title derived under the said judgment is not good.

It may here be observed, that the plaintiff shows a title to those two lots, derived from a purchase from *Platner*, in *May*, 1792.

The conclusion, from this review of the case, is, that the sale of the plaintiff's lots, in 1807, was fraudulent and void. There are several acts in the progress of the proceedings under the judgment, between 1798 and 1807, from each of which the like conclusion might be drawn.

The counsel for the defendants were so pressed upon the argument, with the weight of the proof, that they offered, in behalf of the defendant *S.*, to release all claim and title to the lots of the plaintiff, under the sale in 1807, but objected to a surrender of the possession, or to make a more general release. But the defendants do not set up, or produce, any title, or semblance of title, other than that derived under the judgment, and as the plaintiff received a deed of the lots from *Platner*, in 1792, for a valuable consideration, the

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necessary intendment of law, in the absence of all proof to the contrary, is, that the title of the plaintiff is a good and valid title. The defendants have precluded themselves from questioning the original title of *Platner*, for they set up no title but under him, and they certainly ought not to be permitted to derive any advantage whatever from their fraud, or to retain a possession so unjustly acquired. They are bound in equity to quiet the plaintiff's title, by every act in their power, as some compensation for the injury they have done him. They ought, therefore, to release all claim and pretension to the lots, and to account for the rents and profits, and for all intermediate waste. The defendants ought to be equally charged under the decree, for the acts of fraud were joint acts; and though the one defendant has conveyed his right in the lots to the other, yet this was an act done *pendente lite*, and more than two months subsequent to the filing of the bill.

I might, perhaps, have rested the cause upon some one of the selected points, without examining the others, yet I have deemed it fit and proper, for the sake of example, to review every part of the history of the case which has been laid before me. It is not, however, without pain and regret, that I have felt myself under the necessity of using strong language of reproof and censure upon so many of the circumstances that occurred. Such a case can never be permitted to pass without animadversion, and I hope that this, and many other instances of like abuses, which I have to deal with, may, by the correction they receive, teach a lesson of wisdom and accuracy, moderation and justice, on future occasions.

*Decree.*

The following decree was entered: "It appearing to the Court, that the judgment in favour of *Abraham Bachman* against *Henry Platner*, mentioned in the pleadings and proofs in this cause, was satisfied by a settlement made by and between the parties to it, in the year 1798:

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And it further appearing, that the said judgment, on the supposition that it was not so discharged, was not duly revived by *scire facias*, after *Henry Platner* had been convicted of felony, and sentenced to imprisonment in the state prison for life : And it further appearing, that the balance assumed to have been remaining and due upon the said judgment in 1800, was satisfied upon the execution of the writ of *testatum fieri facias*, also mentioned in the pleadings and proofs, to have been issued thereon to the sheriff of the county of *Delaware* : And it further appearing, that the subsequent execution issued upon the said judgment, to the sheriff of the county of *Cayuga*, also mentioned in the pleadings and proofs, was fraudulently issued and executed, and that the sales under it were fraudulently made by the act and procurement of the defendants : And it further appearing, that the subsequent executions issued upon the said judgment to the sheriffs, respectively, of the counties of *Onondaga* and *Seneca*, also mentioned in the pleadings and proofs, were fraudulently issued and executed : It is thereupon ordered, adjudged, and decreed, that the title acquired by the defendants and *Levi Baxter*, and afterwards vested in the defendant *Samuel Sherwood*, by sale, under the writ of *testatum fieri facias*, issued upon the said judgment to the sheriff of the county of *Onondaga*, to lot No. 33, in the town of *Lysander*, and lot No. 76, in the town of *Solon*, then in the same county, be, and the same is hereby declared to be fraudulent and void : And it is further ordered, &c., that the defendants, respectively, within thirty days after notice of this decree, under the direction of one of the Masters of this Court, by good and sufficient deeds of conveyance, containing apt covenants against their own acts and deeds, release and convey to the plaintiff, his heirs and assigns, forever, all their respective right and title, claim and demand, to the said lots of land, with the hereditaments and appurtenances to the same belonging ; and that they, also, within the same time, deliver to the plaintiff, the full,

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peaceable, and actual possession of the said lots. And it is further *ordered*, &c. that the defendants pay to the plaintiff his costs of this suit, to be taxed, and that they respectively account to and with the plaintiff, for the rents, issues, and profits of the said lots, and for the damages arising from any and all manner of waste committed thereon since the defendants, or either of them, or persons holding under them, or either of them, obtained the possession of the said lots; and that a reference be made to one of the Masters of this Court to ascertain and report the amount thereof, and that when such report shall have been made and confirmed, the plaintiff may have execution for the amount thereof, together with his costs, according to the course and practice of the Court."

**LUPTON** and others *against* **CORNELL** and others.

*H.* purchased a lot of land of *J. S.*, and took a conveyance from him, and executed a mortgage to *J. S.* to secure a part of the purchase money. The mortgage was duly recorded in the county of *Onondaga*, where the lot was situated, but *H.* neglected to have his deed recorded, pursuant to the statute. The defendants, who had purchased the claim of a person in possession of the lot, without title, afterwards procured a release and quit-claim from *J. S.*, for the consideration of ten dollars, though the lot was worth six thousand dollars, and had it duly recorded, before the deed to *H.* was put on record: *Held*, that the record of the mortgage from *H.* to *J. S.* was sufficient evidence that *J. S.* had not any title to the lot; and that the subsequent release and quit-claim of *J. S.* was fraudulent; and the defendants were decreed to execute a release to *H.* of such their pretended claim, so as to *quiet* the title of *H.*

*Nov. 22d,*  
1819, and *Jan.*  
*4th,* 1820.

THE bill, filed *April 9th*, 1817, stated, that the plaintiff, *Abraham Herring*, being indebted to the plaintiff, *W. Lup-*



tion, as trustee of *Margaret Anderson*, an infant, on the 1st of *June*, 1807, mortgaged to *L.*, to secure the bond of *H.* for 1,000 dollars, lot No. 6. in *Camillus*, in *Onondaga* county, containing 600 acres. That the mortgage was duly recorded on the 29th of *July*, 1807; and that the principal and interest, amounting to 1,682 dollars and 50 cents, remained due and unpaid, on the 1st of *March*, 1817. *H.*, on the 8th of *March*, 1813, executed another mortgage of the same lot to the plaintiff, *S. Jones*, jun., to secure him against the endorsement of the note of *H.*, and which *Jones* was, afterwards, obliged to pay, for 2,500 dollars. That this mortgage was duly recorded on the 13th of *May*, 1813. That *N. Denise*, who had, by sundry mesne conveyances from the original patentee, and which were stated in the bill, become owner of the lot, sold and conveyed the same to *H.*, on the 23d of *November*, 1796, and *H.* sold and conveyed it, on the 19th of *April*, 1797, to *James Stewart*, for 1,495 pounds. That *J. S.*, on the 1st of *July*, 1805, sold and conveyed the same lot to *H.* for 3,000 dollars; and on the 2d of *July*, 1805, *H.* mortgaged the lot to *J. S.* to secure the payment of 2,000 dollars, which mortgage was duly registered in *November*, 1805, in *Onondaga* county; and was afterwards paid off by *H.*, and the registry thereof cancelled on the 9th of *March*, 1812. That all the deeds for the said lot, except the release of the 1st of *July*, 1805, from *J. S.* to *H.*, were duly recorded, and that deed was omitted, by accident, to be recorded, until the 12th of *May*, 1815, having been duly acknowledged by *J. S.*, on the 22d of *July*, 1805.

The bill charged, that the defendants, *Paul Cornell*, *Walter Wood*, and *Giles Howland*, with notice of the facts above stated, and having good reason to believe that *J. S.* had conveyed to *Herring*; but discovering that the deed had not been recorded, they, or one of them, on the 9th of *November*, 1813, under false and fraudulent pretences, and with the fraudulent design to defeat the mortgages above mentioned, procured

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*J. S.*, for 100 dollars, (the lot then being worth 6,000 dollars,) to execute a release and quit-claim of all his right and title to the lot to the defendant *C.*, which the defendants caused to be recorded in *Onondaga* county, on the 6th of *December*, 1813. That the plaintiffs are desirous that the lot should be sold to satisfy the mortgage; and that the defendants refuse to give up the quit-claim deed from *J. S. &c.* *Prayer*, that the defendant be decreed to deliver up the said release and quit-claim from *J. S.* to be cancelled, and to release all pretence of right and title to the said lot, &c.; and that the mortgaged premises be decreed to be sold to pay the sums due on the mortgages, according to their priority, and the surplus, if any, paid to *Herring*, &c.

The answer of the defendant *C.* stated, that the three defendants, on the 16th of *November*, 1809, for a valuable consideration, purchased the lot in question of *Parker Burnham*, who pretended to be seised of the lot; and the deed was taken in the name of *C.*, though all the defendants were jointly interested. That the defendants took possession of the lot, and have made improvements thereon. That in the autumn of 1812, the defendant *Wood* was informed, that *J. Stewart*, of the city of *New-York*, claimed title to the lot; that *W.* had the principal agency in the management of the lot, and instructed the defendant *Howland* to purchase of *J. S.* a release of his claim or title, if it could be obtained for a trifling consideration. That *Howland*, accordingly, in the autumn of 1813, procured from *J. S.* a release or quit-claim of the lot, for ten dollars, which was acknowledged and recorded. This defendant denied all agency in the purchase of *J. S.*, further than conversing with *W.* on the expediency of making it. He denied all the charges of fraud, &c. He admitted that the lot, in *November*, 1813, was worth 6,000 dollars.

The defendant, *Howland*, in his answer, stated, that *W.* informed him that he had found a deed for the lot, on record, from *Herring* to *J. S.*, and could not discover that *J. S.* had sold

the lot; and instructed *Howland*, who was going to the city of *New-York*, in *November*, 1813, to purchase the claim of *J. S.* for a sum not exceeding 50 dollars. That *Howland* accordingly applied to *J. S.*, and procured a release and quit-claim, dated *November* 9th, 1813, for 10 dollars, to the defendant *C.*, which he delivered to *W.*, who procured it to be recorded on the 6th of *December*, 1813. That when *Howland* called on *J. S.* to know whether he had any claim or title to the lot, *J. S.* said, "that he had formerly purchased the lot, by which he had lost a considerable sum of money, and had met with other losses, in consequence of which, and his advanced age, he should give himself no further trouble about the lot." That he agreed to accept five dollars for a release; but the next day, refused to leave his work, to go and execute the deed, for less than ten dollars, which the defendant gave him. The defendant denied all fraud, &c. He admitted that the lot, in *November*, 1813, was worth 6,000 dollars.

The defendant *Wood*, in his answer, admitted that he was jointly concerned in the purchase of the lot from *Burnham*, and that on the 15th of *June*, 1810, *C.* conveyed to him, *W.*, a moiety of the lot. He stated that he and *C.*, some time previous to the fall of 1812, were informed that there was a deed on record for the lot to *J. S.* from *A. Herring*. That they consulted about the expediency of buying that title. That the defendant *W.* had "doubts as to the validity of the title of *J. S.* to the lot." That in *October*, 1813, not discovering any deed or mortgage from *J. S.* on record, "though he does not at this time recollect that he searched, or caused search to be made, in the office, relative to the registry of mortgages," he instructed *Howland* to buy the lot of *J. S.*, for a sum not exceeding 50 dollars; and *H.*, accordingly, procured, for ten dollars, a release and quit-claim from *J. S.*, which this defendant had recorded on the 6th of *December*, 1813. That in *April*, 1817, he wrote to a

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person (*W. T. B.*) in *New-York*, to inquire whether the defendant *H.* had any information, at the time he purchased of *J. S.*, of a previous deed from *J. S.* to *Herring*, or to any other person; and that he received an answer, dated *June 27th*, 1817, stating, that *J. S.* said, that he was called on in 1813, by a young man, respecting the lot, who was told that he, *J. S.*, had sold it; but being very urgent, *J. S.* gave him a quit-claim, not supposing that it could affect his sale to *Herring*. The defendant *W.* denied all previous information of the deed from *J. S.* to *Herring*, or that he had any reason to suppose there was such a deed, except from the letter above mentioned. He denied all the charges of fraud, &c. He admitted that the lot, in *November*, 1813, was worth 4,800 dollars. That on the 5th of *May*, 1812, he conveyed 50 acres of the lot to *Jonas C. Baldwin*; and on the 13th of *April*, 1816, conveyed 50 acres of the lot to *W.* for 400 dollars, &c.

The cause was heard on the pleadings and proofs, in *June*, 1819, when it was decreed, that the title of the defendants was fraudulent, and they were directed to release their pretended title to *Herring*, the mortgagor; and the mortgaged premises were directed to be sold, to satisfy the mortgages, &c.

Nov. 22d,  
1819.

The defendants petitioned for a rehearing, which was granted; and the cause was, this day, argued, on the rehearing, by *H. Sedgwick*, for the defendants, and *S. Jones*, for the plaintiffs.

Jan. 4th, 1820.

THE CHANCELLOR. The bill is to foreclose two mortgages upon lot No. 6, in *Camillus*, and executed by *Abraham Herring*, the one to the plaintiff *Lutton*, and the other to the plaintiff *Jones*. The title of *Herring* is spread out upon the bill, and deduced down from the original patentee. The chain of title is regular and perfect, but there was a

delay of nearly ten years in putting upon record the deed from *James Stewart* to *Herring*, of the 1st of *July*, 1905. In the mean time, the defendants fraudulently procured a release and quit-claim from *Stewart*, for a nominal consideration, and placed it upon record before the prior and genuine deed from *Stewart* was recorded. The bill charges this fraud upon the defendants, and in addition to the usual prayer for a sale of the mortgaged premises, the bill seeks to have the quit-claim deed cancelled, and the pretence of title, on the part of the defendants, released.

The cause was brought to a hearing at the last *June* term, upon the pleadings and proofs, and the claim, on the part of the plaintiffs, appeared to be so just, and the fraud, and want of title, on the part of the defendants, so manifest, that it was almost, as of course, decreed, that the mortgaged premises be sold, in the usual way, to satisfy the mortgage debts, and that the defendants execute to the mortgagor a release of their pretence of title, with covenants against their own acts. Two parts of the mortgaged premises of fifty acres each, were excepted out of the decree of sale, having been sold and conveyed by the defendants previous to the filing of the bill, but the defendants were directed to account for the proceeds of the sale of those two parcels.

Upon this decree, a rehearing has been asked for and obtained, and the propriety of the decree has been discussed and considered. The defendants, by this re-examination of the merits, have made it incumbent upon me to discuss the transaction with an explicitness and freedom, which I wished to avoid.

That the quit-claim deed from *Stewart* to the defendant, *Cornell*, for the joint use and benefit of all the defendants, was fraudulently procured, cannot admit of any doubt. The defendants assume to be equally interested in the lot, and every act in relation to the title seems to have been considered as an act equally affecting all of them. They set up no other title than a deed from one *Parker Burnham*,

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of the 15th of *November*, 1809. We are to presume him to have been a mere occupant, for no title in him is pretended; and when the defendants procured that deed, they must have known, or were bound to know, he had no title, for all titles to the military lands had, by a statute long previously existing, been required to be put upon record. The defendant, *Wood*, resided in the county of *Cayuga*, and was, no doubt, well skilled in the law relative to the military titles. There was evidence sufficient upon record to show, that the title was not in *Burnham*. The defendant *Wood* says, that he had discovered, "at some period previous to the fall of 1812," that *Stewart* had a deed upon record from *Herring*. How long before that period, he had made the discovery, does not appear. It is probable, he had made it before he took a deed from *Burnham*, as the deed from *Herring* to *Stewart* was recorded in 1797. After making that discovery, he and the defendant *Cornell*, consulted with each other as to the expediency of buying *Stewart's* title, and he had "doubts as to the validity of the title of the said *James Stewart*, to the said lot." These doubts could not have arisen from any belief in the title of *Burnham*, (for that title appears not to have had any source or foundation,) but from the plain and unerring language of the public records, which he was in the habit of searching. There was a mortgage duly registered on the 1st of *November*, 1805, from *Herring* to *Stewart*, and that registry was evidence sufficient to satisfy any man of common sense, that the title which was in *Stewart*, in 1797, had passed out of him, and was in *Herring* in 1805. Had not this defendant inspected that registry? He says, indeed, that "he does not, at this time, recollect that he searched, or caused search to be made, in the office, relative to the registry of mortgages," when he instructed the defendant *Howland*, in *October*, 1813, to go to *Stewart*, in *New-York*, and buy the lot of him, for a sum not exceeding fifty dollars. Can there be higher or more decisive proof, that he then

*knew* that *Stewart* had parted with his title? He admits, that he had long before discovered upon record the deed from *Herring* to *Stewart*; and he admits, that the lot was then worth from 4,800 dollars to 6,000 dollars, and yet he sends an agent to buy up *Stewart's* title, for a sum not exceeding fifty dollars. The proposition imports fraud on the very face of it. He intended to defraud the real owner, who then held the title derived from *Stewart*. The manner in which this agency was executed, appears from the answer of *Howland*, one of the associates in the purchase.

*Howland* says, that in pursuance of his instructions, he applied to *Stewart*, in the city of *New-York*, and procured his release and quit-claim, for ten dollars, though the sum inserted in the deed, as the consideration, was 100 dollars. He says, that when he called on *Stewart* to know if he had any claim or title to the lot, the latter said, that "he had formerly purchased the lot, by which he had lost a considerable sum of money, and that he had met with other losses, in consequence of which, and his advanced age, he should give himself no further trouble about it." *Stewart* then agreed to execute a release, for five dollars, but on the next day, he refused to leave his work and go and execute the release, for less than ten dollars, which were given him.

The story, as to the reply of *Stewart*, is absurd. The defendant, *Howland*, meant to be understood, that *Stewart* then considered himself as owner of the lot, yet that he set no value upon it, though in 1797 he had given 1,495 pounds for that and three other military lots. The true account of the interview is given by *Stewart* and his wife, who both prove the answer of *Howland* to be false. They testify, that when the application was made to *S.* for the release, he told *Howland* that he had before conveyed the lot to *Herring*, and he referred the applicant to him. That *Howland* (whom he did not then know) repeatedly called upon him, and urged the execution of a quit-claim deed, and represent-

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ed to him that it would injure no person. That he, supposing that *H.* had purchased of *Herring*, executed the deed. *Howland* says, he delivered the release so purchased, to the defendant *Wood*, and *Wood* admits he received it, and caused it to be recorded, on the 6th of *December*, 1813.

The other defendant, *Cornell*, says, that *Wood* had the principal agency and management of the lot, and he admits, that *Howland* was instructed by *Wood* to procure the release, and that he and *Wood* had previously conversed respecting the expediency of procuring it.

Here was, then, a quit-claim fraudulently procured from *Stewart*, with intent to defraud the legal owner under *Stewart*, and it was procured on the joint consultation and act of all the defendants. One of them, who was the agent under *Wood* in procuring it, is detected in positive falsehood and fraud; and are we not bound to conclude, from the overwhelming force of the circumstances, that *Cornell*, who advised it, and *Wood*, who instructed the agent to procure it, for a nominal sum, and who received it immediately afterwards, and had it recorded, were equally guilty? I am entirely satisfied, that all the defendants are chargeable with actual fraud.

Upon the ground of that fact, the decree in *June* was correct. If the defendants had any good title, they should have put it forward. They have chosen to set up a claim under a third person, in whom no manner of title appears, either from their own answers, or from the proof, and they have chosen to bring forward a quit-claim deed taken purposely to defraud the plaintiff *Herring*. The title of the plaintiff *Herring*, is deduced from the fountain head, and appears to be sound and unbroken. It is, therefore, just and equitable, that the plaintiffs should be quieted in their title against all claim and pretension in the defendants. It is the duty of the Court to clear the title, under the allegations and proofs in the case, before the mortgaged premises



are exposed to sale, and not leave purchasers under the decree to be embarrassed and exposed to further litigation.

The decree of the 23d day of *June* last is, in every respect, confirmed, together with the additional costs of this rehearing.

Decree accordingly.

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COXE and others *against* SMITH and others.

When, on a bill for a partition, the legal title is disputed and doubtful, the course is to send the plaintiff to a Court of law, to have his title first established.

But where the question arises upon an equitable title, set up by the defendants, this court must decide on the title.

Where a person having the legal title to lands, but in trust, as the defendants alleged, for them, sold and conveyed his right and title, for a valuable consideration, to a *bona fide* purchaser, without notice, who remained in possession of the land for eighteen years before his death, and devised the same by will: *Held*, that after the lapse of thirty years from the date of the deed, there being no evidence of its being fraudulent, the devisees of such purchaser were entitled to hold the lands discharged of the trust.

**BILL** for a partition of a tract of land of 29,812 acres, lying in the counties of *Tioga* and *Broome*. It appeared from the pleadings and exhibits in the cause, that Col. *Daniel Coxe*, of *Trenton, New-Jersey*, (grandfather of the plaintiffs, *Daniel Coxe*, and *Grace Kempe*,) who died in 1739, derived from his father, Doctor *Coxe*, of *London*, sundry rights under the crown of *Great Britain*, to lands in the *North American* colonies. That some years after his death, his representatives, on relinquishing those rights, received in lieu thereof, an order of the king and council, or *mandamus*, dated *April 14, 1769*, for 100,000 acres of land,

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to be taken up in tracts of not less than 20,000 acres, in the then province of *New-York*, to *Daniel Coxe*, plaintiff, *William Coxe*, since deceased, *Rebecca Coxe*, since deceased, *Grace Kempe*, late *G. Coxe*, and her husband, *John Tabor Kempe*, since deceased. That in this *mandamus*, *D. C.* had an interest of *five sixteenths*, *W. C.* *five sixteenths*, *R. C.* *four sixteenths*, and *G. K.*, and her said husband, each *one sixteenth*. The parties located 47,000 acres in *Tryon*, now *Oneida* county. Of the remaining 53,000 acres, *D. C.*, and *K.* and his wife, were entitled to seven sixteenths, or 23,187 acres and a half, and *W. C.* and *R. C.*, to the residue, being 29,812 acres and a half. *W. C.* and *R. C.*, employed *Dr. William Smith* to locate their 29,812 acres, and covenanted that he should have, for his services, the one moiety of the share of *W. C. Smith*, accordingly, procured leave to locate at *Owego*, near the north line of *Pennsylvania*, and on the 3d of *October*, 1774, obtained a warrant of survey, for that purpose. *Kempe*, who had acquired the share of *D. C.*, and his wife's right, and had made a location on the east side of *Lake Champlain*, abandoned that location, and through the agency and information of *Smith*, located the 23,187 acres at *Chenango*, in the vicinity of the location at *Owego*, and obtained a warrant for that purpose. The two locations were separate and distinct, and for separate uses. *Caveats* were entered against patenting these locations. By the exertions of *Smith*, *W. C.*, and *R. C.*, the *caveat* as to the 29,812 acres was withdrawn, and a patent was issued, dated *January 5*, 1775, according to the practice and forms of office, to *D. C.*, *W. C.*, *R. C.*, *J. D.*, *K.* and *G.* his wife, the original nominees in the *mandamus*, for the quantity of land so located, being the same tract for the partition of which the bill was filed. *W. C.*, *R. C.*, and *Smith*, alone paid for the expenses of the location of the 29,812 acres, and paid all the usual fees on passing the patent, among which was the sum of 89*l.* 8*s.* to *J. T. Kempe*, as Attorney General, for his official *fiat* to the patent. *Kempe*

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alone paid all the expenses of the location at *Chenango*. After the patent issued, a new agreement was entered into between *Smith, W. C.*, and *R. C.*, dated the 9th of *January, 1775*, by which it was stipulated, that *Smith*, instead of half of the share of *W. C.*, should have, and be entitled to, one third of the 29,812 acres, for his share, he having paid one third of the expenses of obtaining the patent. *Daniel Case*, one of the nominees in the *mandamus*, and named, also, in the patent, on the 25th of *February, 1775*, agreed to join in all necessary conveyances, &c. to assure to *Smith* one third of the said tract so located at *Owego*. *Kempe* hesitated and delayed, on various pretexts, to release his title to the *Owego* location; and the caveat against the *Chenango* location, continued until the revolutionary war commenced, when *Kempe* and *D. Coxe*, removed to *England*, and fixed their residence there. On the 29th of *September, 1783*, *W. C.*, and *R. C.*, released to *Smith* their right in law and equity, to an undivided third part of the 29,812 acres. Since the peace of 1783, *D. C.* refused to release his right to the representatives of *W. C.*, *R. C.*, and *Smith*, and said that he had released it to *Kempe*. On the 9th of *December, 1784*, the representatives of *W. C.*, and *R. C.* entered a caveat in the secretary's office, against any patent issuing for the *Chenango* lands, until a release should be obtained from the other nominal grantees in the patent for the *Owego* lands, to them and *Smith*. *Rebecca Coxe* died in 1802, and *Smith* died in 1803. On the 26th of *August, 1789*, for the consideration of 1,500 pounds, *D. C.* conveyed to his father-in-law, *John Redman*, all his right and title to the five undivided sixteenth parts of the said tract of 29,812 acres. The defendants, in their answer, averred, that this deed was not *bona fide*, or for a valuable consideration, but upon some secret trust; but there was no proof of this allegation. In *March, 1810*, certain settlers on the said land, presented a petition to the legislature, suggesting, among other things,

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that the title of *J. T. Kempe* to two sixteenth parts, in the said land, had, in consequence of his attainder, become vested in the people. The attorney general, to whom the petition was referred, reported, that the people had no title to any part of the land, and that the representatives of *W. C., R. C. and Smith*, ought not to be molested or disturbed in the enjoyment thereof; in which report the house of assembly concurred. In consequence of an act of the legislature, passed in 1784, or 1785, which declared all *British* or colonial warrants of survey, except to officers and soldiers, for military services, not actually executed, null and void, *R. L. Hooper*, and his associates, who had entered a *caveat*, prevailed. The bill alleged that the representatives of *W. Smith* were entitled to one third of the tract of 29,812 acres, *John Redman Coxe*, to five sixteenths of the residue, *D. Coxe* and *Grace Kempe*, each to one sixteenth, the representatives of *W. Coxe*, to seven sixteenths, and the people of the state to the other two sixteenths. The answer denied that any person had any joint or equitable claim to any part or share in the said tract, but the representatives of *W. Smith, William Coxe, and Rebecca Coxe*, except such parts as *Daniel Coxe* and *Grace Kempe* might be entitled to, as heirs of *Rebecca Coxe*; and that, in whomsoever the legal title to any part of the said land was now vested, they must be deemed, in equity, trustees for the legal representatives of *W. Smith, W. C., and R. C.*, according to their several shares therein.

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1819.

The cause was brought to a hearing on the pleadings and proofs.

*Harison, Hoffman, and B. Robinson*, for the plaintiffs.

*Sampson*, for the defendants claiming under *William* and *Rebecca Coxe*.

*T. A. Emmet*, for the defendants, *William M. Smith* and *Charles Smith*.

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*Burr*, for other defendants claiming under *W. Smith*.

For the plaintiffs, the following cases were cited : 1 *Bro. P. C.* 200. 4 *Ves.* 667. 686. 5 *Ves.* 720. note. 722. 1 *Madd. Ch. Pr.* 198. 1 *Fonb. Eq.* 18, 19. 8 *Ves.* 143. 1 *Ves. & Beames*, 551. 236.

For the defendants, the following cases were cited : 2 *Atk.* 380. 3 *Atk.* 4. 2 *Bro. P. C.* 281. *Amb.* 586. 7 *Ves.* 341. 1 *Johns. Ch. Rep.* 117. 149. 3 *Johns. Ch. Rep.* 302. 3 *Johns. Rep.* 216. 9 *Johns. Rep.* 406.

The cause stood over for consideration until this day. Jan. 4th, 1820.

THE CHANCELLOR. This is a bill for a partition of a tract of land, containing 29,812 acres, lying in the counties of *Tioga* and *Broome*. According to the allegations of the plaintiffs, the representatives of *William Smith*, deceased, are entitled to an undivided third part of the premises, the plaintiff, *John Redman Coxe*, to five sixteenths of the residue, the plaintiffs, *Daniel Coxe* and *Grace Kempe*, each to one sixteenth of the residue, the representatives of *William Coxe*, deceased, to seven sixteenths of the residue, and the people of this state to two sixteenths of the residue.

The defendants admit the right of the representatives of *Smith*, and the rights of *Daniel Coxe* and *Grace Kempe*, but deny the right of the plaintiff *John Redman Coxe*, and of the people, and claim fourteen sixteenths of two third parts of the premises, as belonging in equity to the representatives of *William Coxe*. The parties have gone into proof on the subject of the equitable title set up on the part of the defendants.

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1. The first point is, whether the defendants can set up equitable rights in opposition to the legal title, and claim partition, according to those rights, by an answer.

When the legal title is disputed and doubtful, the course has been, to send the plaintiff to law to have that title established before he comes here for a partition. (*Wilkin v. Wilkin*, 1 *Johas. Ch. Rep.* 111.) But when the question arises upon an equitable title set up on the part of the defendants, this Court must decide the title, for equitable titles belong peculiarly to this Court, and the parties cannot be sent to law. It is the proper province of this Court to recognise and support equitable titles, and there can be no other objection to the inquiry, than the form and object of the bill. If the Court cannot take cognisance of the equitable title upon this bill, it would only be to let the cause stand over until the defendants, or such of them as ask for the recognition of their equitable title, can file a cross bill. But can that be necessary? In what way, or from what causes, the Court of Chancery first acquired jurisdiction in partition, is not now material. The jurisdiction is settled, and recognised by statute. (*Vide Act, sess. 36. c. 100. s. 16, 17.*) When this Court sustains a bill for a partition, it acts as a Court of equity, and not as a Court of law, and equitable rights are true and perfect rights, in the contemplation of this Court. In *Cartwright v. Putney*, (2 *Atk.* 399.) the plaintiffs' bill for partition was founded on an equitable title; and Lord *Hardwicke* said, he must determine it, though the objection there was, that it was an equitable title, not a legal one. He decreed a partition, and that the trustees, in whom the legal title resided, should convey.

If the plaintiff can come into this Court for a partition, upon an equitable title, the defendants, who are brought here upon such bill, can surely set up such a title to be recognised and protected upon the partition.

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2. Assuming that the equitable title is properly before the Court for consideration, the evidence is sufficient to satisfy me, that the 29,812 acres, at *Owego*, were located and surveyed according to the understanding and agreement of all the parties concerned in interest under the *mandamus*, for the exclusive use and benefit of *William* and *Rebecca Coxe Kempe*, who represented the other interests of himself and his wife, and of *Daniel Coxe*, under the *mandamus*, made a separate location, for their distinct interests, first upon lake *Champlain*, and then on the *Chenango*. The expenses of each location and survey, were borne by the parties separately, and the locations, by the various acts and declarations of the parties, were treated as locations of separate and detached interests. When the patent issued, in 1775, for the location of the 29,812 acres at *Owego*, for *William* and *Rebecca Coxe*, it issued according to the form and practice of the government in such cases, in the name of all the nominees in the *mandamus*. But *Daniel Coxe*, and *Kempe* and his wife, took the legal title in trust for *William* and *Rebecca Coxe*, and for *William Smith*, who had been admitted to a share. The fact, that *William* and *Rebecca Coxe*, and *William Smith*, paid all the fees of survey, and particularly the patent fees, of which 89l. 8s. were paid to *Kempe*, as Attorney General, being a customary and full fee, for giving his *fat* to the patent, is decisive evidence of the trust; and this expenditure of money, with the knowledge and assent of *Kempe*, is evidence of part performance of the original agreement, and ground for a decree for a specific performance. I would refer, also, particularly to the letters of *J. T. Kempe*, of the 5th of *November*, 1774, and of the 28th and 29th of *January*, 1775; to his instructions for the survey of his warrant, or location, for the 23,188 acres, on the *Chenango*; to the caveat of the 9th of *December*, 1784; to the letter of *William Coxe* of *February* 11th, 1775; and to the report of *Van Vechten*, the Attorney General, to the Legislature, of the 2d of *February*, 1811.

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3. But another question arises, even upon the assumption of the trust, and that is, upon the force and effect of the deed from *Daniel Coxe* to Dr. *John Redman*, of the 28th of August, 1789. That deed was proved before the Mayor of *Philadelphia*, in December, 1789, and purports to be a conveyance, in fee, of his legal title to the five sixteenth parts of the patent, for the consideration of 1,500 pounds, and the receipt of the consideration is, according to the practice in conveyancing at that day, endorsed upon the deed. The bill then states, that *Redman* being seised under that deed, made his will on the 9th of November, 1807, and speaks in it of "his purchase" by that deed, and devises the land to his grandson, the plaintiff, *John Redman Coxe*, and to *Phineas Bond*, in trust, for the said *Daniel Coxe*, (his son-in-law,) and his daughter, and their five children; and that having made his will, he died seised, and that the plaintiff, *John Redman Coxe*, claims under that will. The deed and will are in proof.

If that deed was received by Dr. *John Redman*, *bona fide*, and for the valuable consideration it imported, he, and those who claim under him, took the legal right of *Daniel Coxe*, discharged of the trust. The defendants, in their answer, aver that the deed was not *bona fide*; but there is no evidence in the case that impeaches it; and after such a lapse of time, (being thirty years from the execution of the deed, during eighteen years of which, Dr. *John Redman* is averred to have remained seised,) and after such new rights acquired under the purchaser, I am induced to think the presumption must now be taken to be in favour of the deed, and that it was incumbent on those who set up the trust in *Daniel Coxe*, to give some evidence that the deed was not what it purported to be.

Decree.

The following decree was entered: "*Inasmuch as it appears to the court, that the letters patent under the great seal of the late colony of New-York, bearing date the 5th*



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day of *January*, 1775, by which the premises mentioned and referred to in the same, were granted to *Daniel Coxe*, *William Coxe*, *Rebecca Coxe*, and *John Tabor Kempe*, and *Grace* his wife, were so granted, from conformity to the forms of office, and truly and in fact, to and for the separate use and benefit of the said *William Coxe* and *Rebecca Coxe*, and that the said *Daniel Coxe*, *John Tabor Kempe*, and *Grace* his wife, became trustees for their proportion of the said premises, granted, as aforesaid, by the said letters patent, to the said *William Coxe*, and *Rebecca Coxe*, in whom, and in *William Smith*, hereinafter mentioned, the equitable title resided : and it further appearing, that *William Smith*, in the pleadings mentioned, was entitled to one equal undivided third part of the said premises, in the manner set forth in the said pleadings : and it further appearing, that the said *Daniel Coxe* being seised of the legal title under the said patent, to five parts out of sixteen, in the remaining two third parts of the said premises, in trust aforesaid, did, on the 28th day of *August*, 1789, by a deed duly executed, purporting to be given for a full and valuable consideration, convey in fee to *John Redman*, his said legal right and interest in the premises, without any declaration or notice of the said trust, and nothing appearing in the case to affect the presumption arising from the deed, the lapse of time, and the long seisin, and last will of the said *John Redman*, in favour of the said deed, as being a *bona fide* purchase, for a valuable consideration : and it further appearing, from the pleadings and proofs, and the report of the attorney general, of the 2d day of *February*, 1811, that the people of this state have no valid title to any part of the said premises, from or under the said *John Tabor Kempe*, and the equitable rights of the parties being cognisable in this suit ; it is thereupon *Ordered*, &c. that the legal representatives of the said *William Smith*, being defendants in this cause, are entitled to one equal undivided third part of the premises, whereof partition is sought in and by the plain-

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tiff's bill; and that *John Redman Coxe*, one of the plaintiffs, as surviving trustee under the last will and testament of *John Redman*, deceased, is entitled to five equal undivided parts, out of sixteen of the remaining two third parts of the said premises; and that the plaintiff, *Daniel Coxe*, is entitled to one equal undivided sixteenth part of the said two third parts of the premises, as one of the heirs at law of *Rebecca Coxe*, deceased, in the pleadings mentioned; and that the plaintiff, *Grace Kempe*, is entitled to one other equal undivided sixteenth part of the said two third parts of the premises, as one of the heirs at law of the said *Rebecca Coxe*; and that the representatives of *William Coxe*, deceased, being defendants in this cause, are entitled to nine equal parts out of sixteen, being the residue of the said remaining two third parts of the premises. And it is further Ordered, &c. that it be referred to one of the masters of this Court, to enquire into, ascertain, and state to the Court, the subdivision and proportions of the rights and interests aforesaid, between the several representatives of *William Smith*, and of *William Coxe*, as aforesaid, and that the master take such proof, and require the production of such deeds and papers as he may deem necessary, and which may be taken and required according to the course and practice of the Court, and that he report with all convenient speed, to the end, that upon the confirmation of his report, a commission may issue to make partition accordingly. And all further directions and questions are reserved until the coming in of the report."

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W. S. SMITH *against* W. SMITH, jun. and others.

If a guardian, or other *trustee*, lends the money of the *cestui que trust*, without due security, he will be responsible, in case the borrower becomes insolvent.

What is due security for monies loaned by a trustee, appears to be a point not fully settled and established. *It seems*, in general, that *personal security* is not sufficient to shield the ~~testator~~ from responsibility, in case of loss.

Where a guardian took promissory notes of persons solvent, at the time, and who continued to be solvent to the time of taking the account before the master, under a decretal order of the Court, on a bill filed for an account, and which notes were allowed and credited the guardian in the account, and were ready to be delivered by him, the Court confirmed the report of the master; the notes being for small sums, for rents, &c. and the credit and course of business according to the practice of the testator in his lifetime.

A guardian, or trustee, is not held to account for any neglect or breach of duty not charged in the bill.

THE bill stated, that W. S. the father of the plaintiff, by *Jan. 8th, 1820.* his will, dated October 18th, 1801, devised his personal estate, after payment of his debts, to the plaintiff, and his brother A. S., equally; and one part of his real estate to the plaintiff, and the other to his brother A. S. describing them particularly, and the survivor was to take the whole, if the other died under age. J. Smith, and the defendant W. S., were appointed executors, who qualified, and possessed themselves of the personal estate. A. S. died an infant, and intestate, and the plaintiff became his administrator. On the 27th of October, 1804, the defendant W. S. and M. S. Woodhull, since deceased, were appointed guardians of the personal estate of the plaintiff and his brother, and entered into possession of the rents and profits of the real estate.

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*M. S. Woodhull* died the 5th of *November*, 1815, and made the other two defendants, *T. S. Strong* and *Mary Woodhull*, his executors, who qualified, &c. That after the death of *M. S. Woodhull*, the rents and profits of the real estate of the plaintiff and *A. S.* were received by the defendant *W. S.* The plaintiff came of age on the 8th of *July*, 1817, when *W. S.* surrendered up the possession of the real estate to him. That the defendant *W. S.* took possession, as guardian, of a dwelling house at *Long Swamp*, *Suffolk* county, belonging to the plaintiff, of the yearly value of 250 dollars, under pretence that he would occupy it as tenant, at a reasonable rent; and while he so occupied it, committed waste, &c. Prayer, that the defendants may account, and pay the balance due to the plaintiff, and surrender up all mortgages, and other real securities, for money lent for account of the plaintiff, or his brother *A. S.* and to make satisfaction for the waste, &c.

The defendants having answered, the cause was brought to a hearing, and a decretal order entered the 7th of *October*, 1818, by which it was referred to a master to state and take an account, touching the monies received by the defendant *W. S.*, and *M. S. Woodhull*, deceased; and an account of the rents and profits of the real estate of the plaintiff and his brother, from the time they were appointed guardians, until the death of *M. S. W.*; and touching the monies received by the defendant *W. S.*, for and on account of the said rents, issues, and profits, since the death of *M. S. W.*, to the filing of the bill; and touching the monies paid by the two guardians, or either of them, or expenses incurred or charges made, or either of them, in the support and education of the plaintiff and *A. S.*, and in and about the said real estate. That the master report the balance due from either party on such accounting. That he report the fair annual value of the *Long Swamp* farm, during the period it was occupied by the defendant *Smith*, and that he also ascertain and report whether the defendant *Smith* committed

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waste while he occupied the same, and the amount thereof, if any.

The master reported specially ; and a balance of 861 dollars and 3 cents due from the defendants to the plaintiff.

Several exceptions were taken to the report by the plaintiff; the *first* and *third* of which, with the opinion of his honour the Chancellor upon them, are as follows :

*First exception.* Because, it appears that the master has charged the plaintiff, and credited the defendants, with the amount of sundry notes and obligations, some of which are said to have been taken by the defendant *Smith*, and *M. S. Woodhull*, deceased, or one of them, for arrears of rent due to the plaintiff or his brother *Apollos*, and others to have been taken for monies belonging to the plaintiff or his brother *Apollos*, and loaned out or placed at interest by them; or one of them; whereas the plaintiff ought not to be charged, nor the defendants credited, with the amount of the said notes, nor any of them.

THE CHANCELLOR. There is not a single bad note taken by the guardians. It appears from the testimony, that every person to whom they had loaned money was a safe and responsible person at the time of the loan, and remained so when the testimony was taken. It was the same case with the persons from whom notes were taken for arrearages of rent. The testator appears to have been in the habit of giving three months credit to the tenants for arrears of rent, and the guardians gave the same credit. Notes so taken were usually at six per cent, which appears to be the customary rate of interest in *Suffolk* county. In a case, like the present, where the sums were comparatively small, and the habit of dealing according to the practice which we have reason to presume was pursued by the testator, and especially where the debtors were originally sound, and continued so to the time of taking the account by the master, I am

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induced to think we may, consistently with the policy and the doctrine of this Court, credit the guardian with the notes which he has ready to surrender. It would, under such circumstances, be unreasonable, and render the trust of a guardian an object of unnecessary hazard, distrust, and aversion, to charge him with the amount of the notes in cash; and throw the future trouble and risk of collection upon him. I am not aware that any cases carry the rule to this rigorous extent. But in adopting this course, I mean to be understood, that if a guardian or other trustee loans money without due security, he must be responsible in case of insolvency. This is the settled *English* rule, and it ought to be followed. If any well grounded distrust had even been excited by the testimony, as to the safety of the debts, or any of them, I should have held the guardian responsible, and made him take such notes to himself.

What is due security for moneys loaned by a trustee, is a question I am not now called to discuss. The *English* rules are exceedingly strict on the subject of trusts, and especially of infants' moneys. An executor must not even rest on personal security; and if he does, it is at his own hazard. (*Terry v. Terry*, *Prec. in Ch.* 273. *Wilkes v. Steward*, *Cooper's Eq. Rep.* 6.) Lord Kenyon said, in *Holmes v. Dring*, (2 *Cox's Cases*, 1.) that it was never heard of that a trustee could lend an infant's money on private security. If he does, and takes a bond, with personal security, he must be responsible, if the obligors become insolvent, though they were in very ample circumstances at the time the money was lent. I have no doubt that it is a wise and excellent general rule, that a trustee loaning money, must require adequate real security, or resort to the public funds. If he invest the trust moneys in the public funds, he is not liable to the fall of stocks; (3 *Bro.* 434.) and, probably, the depreciation of the real security would come within the reason of that rule. But personal security is always more or less precarious; particularly, when the credit is

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given for a considerable length of time, or when the borrower, or his surety, is engaged in mercantile, or other hazardous pursuits. Lord *Alvanley*, in *Powell v. Evans*, (5 Ves. 839.) held the executor responsible for a loss by insolvency, where he permitted, negligently, and without good reason, money to remain longer than was absolutely necessary, upon personal security taken by the testator, in his lifetime. This case is a strong illustration of the strictness of the doctrine upon which the general rule is founded. It is not, however, necessary for me to say, whether the rule declared by Lord *Kenyon*, is to be taken, at all times, and under all circumstances, in so absolute and unqualified an extent. Possibly, there may be cases in which the taking of personal security would exonerate the trustee, if that security was selected with discretion, and according to the practice of the testator, in like cases. The former cases were more indulgent than the latter ones. The observations of Lord *Ch. Harcourt*, in 1 P. Wms. 241, and of Lord *Northampton*, in *Harden v. Parsons*, (1 Eden. 145.) seem to admit of more latitude than the doctrine in *Holmes v. Dring*. I am not, however, prepared to say whether any, and if any, what exceptions, may exist to the general rule on this point. I have not formed any absolute opinion on the subject, and must leave it to be discussed and considered when it shall arise.

The first exception is, consequently, overruled.

[The answer to the second exception was contained in the master's supplementary report, under the order of the 13th of September last, and the explanation is entirely satisfactory. To allow the exception, would be charging the defendants twice for the same thing.]

*Third Exception.* That the master has omitted to charge the defendants, and to credit the plaintiff, with the rents

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which accrued and became due on the 1st of *March*, 1804, whereas the defendants ought to have been charged with 275 dollars, for the rents which accrued and became due on that day.

**THE CHANCELLOR.** It appears, from the supplementary report, that the rents for the year 1803, were accounted for and settled with *John Smith*, as acting executor of *William Smith*, deceased, previous to the 27th of *October*, 1804, on which day, as appears by the bill, the guardians were appointed.

The only complaint, then, against the guardians is, that they did not collect this money of the executor, who duly received it. But there is no such neglect charged in the bill, and they are not to be answerable for breaches of duty not alleged in the bill. If it had been made a substantial allegation, they might, perhaps, have met and answered it fully, and excused themselves completely from the charge of that neglect or default. They are charged with specific breaches of duty, and are called to account generally for the assets received, and they are not bound to answer beyond the allegations in the bill.

Exceptions overruled.



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*The Executors of* ROBERT T. LIVINGSTON *against* JOHN LIVINGSTON.

It is too late to object to the jurisdiction of the Court, at the hearing, after the defendant has answered, and put himself on the merits, instead of demurring to so much of the bill as seeks relief.

Rent may be recovered in equity, where the remedy has become difficult or doubtful at law, or where there is perplexity or uncertainty as to the title, or the extent of the defendant's responsibility.

Uncertain damages cannot be set off in equity, any more than at law.

Therefore, on a bill of discovery, and for an account and payment of arrears of rent, the defendant is not entitled to be allowed, by way of set-off, damages for the breach of a covenant on the part of the grantor, to allow him sufficient *common of pasture and estovers*.

Lapse of time operates, in equity, only by way of evidence, as affording a presumption of payment.

Therefore, where the defendant admitted the original covenant to pay rent, and did not, in his answer, pretend to any payment; held, that he could not insist on the lapse of time, being twenty years, from the date of the covenant to the filing of the bill, as presumptive evidence of payment.

THE bill stated, that *Robert Livingston*, proprietor of the manor of *Livingston*, on the 22d of *January*, 1722, executed a perpetual lease to *Peter Cole*, of a farm, of about 216 acres, at the rent of *one-tenth* of the yearly produce, four fat hens, &c. That by several devises, which were specified, *R. T. L.*, the testator, became seized, &c. and entitled to the rents, &c., and died in 1814, having devised his interest, &c. to the children of *Mary*, the wife of *Alexander Crofts*, plaintiffs; (her son *R. L. C.* excepted;) and that, until the youngest child came of age, the rents, &c. should be taken by the executors, (plaintiffs,) upon trust, &c. That the defendant, as assignee of *Cole*, is in possession of part of the premises, and has been in posses-

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sion since *November*, 1794, and has, during that time, received the rent of the residue of the premises, and applied the same to his own use. That *R. L.*, the proprietor of the said manor, was seized of the *Conine* farm, and two other pieces of land, in the same manor, particularly described, which, by various devises, in like manner, became vested in *R. T. L.*, subject to the leases made of the same, by *R. L.*, or his devisees. That *R. T. L.* died seized thereof, and the defendant had received the rents of those parcels of land, since the death of *R. T. L.*, and for many years before. That a perpetual lease had been given of the *Conine* farm, reserving rent, &c., which had been assigned to the defendant, but no leases had been given of the other pieces of land. *Prayer*, that the defendant may *discover* his title to the farms and premises described, and his right to receive the rents, and the deeds, leases, &c. by which he holds, or claims to hold, the same; and an account of the rents received by him, and how long he has enjoyed the same; "to the end, that such relief may be given to the plaintiffs, as their case may require, and as shall be consistent with equity and good conscience."

The *answer* of the defendant admitted the material allegations in the bill; and stated, that on the 6th of *July*, 1796, he purchased of *R. T. L.*, all his right and interest to the rents of the *Cole Farm*, for the yearly rent of twelve pounds, for ever. That he purchased, in 1795, all the interest of *R. T. L.* in the *Conine Farm*, for 500 pounds, and in the other two tracts, for 300 pounds; and received the rents and profits since the death of *R. T. L.*, and for several years before. The defendant demurred to a further discovery of his title, and refused to exhibit his deeds, as the plaintiff had not waived all forfeitures, &c., the bill being *amended*, and the plaintiff having waived all forfeiture arising from any covenants in the deeds, &c. The defendant further answered, setting forth his deeds, &c.; in which there were covenants on the part of *R. T. L.*, that the de-

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defendant, his heirs and assigns, should have the privilege of common, for all commonable beasts and cattle, and liberty to cut and use sufficient timber and wood for building, fencing, fire, and repairs of houses and fences, from such part of the manor of *L.* as was, or, from time to time, should be waste, or in common, or unimproved. The defendant averred, that when he received the deed of the *Cole Farm, &c. R. T. L.* owned large tracts of common, in the said manor, from which the defendant might have taken common of pasture and estovers, for fencing, fuel, &c. but that *R. T. L.* soon after leased, or appropriated the common or waste lands in the manor, and thereby deprived the defendant of his commons, &c. ; and the defendant prayed, that an account might be taken of the yearly value of the right of commons ; insisting, that the liability for those commons exceeded in amount any rent due to the plaintiff ; and, also, that *R. T. L.*, at his death, was indebted to the defendant for moneys paid, &c.

The cause was heard on the bill and answer.

*Van Buren*, for the plaintiffs.

*E. Williams*, for the defendant.

THE CHANCELLOR. This is a bill for the discovery of the title of the defendant to certain lands in the manor of *Livingston*, chargeable with rent to the plaintiffs, or to those whom they represent ; and it seeks for relief by having the portions of the lands chargeable with rent, located, and an account of the rents due, and for " such relief as the case may require, and as may be consistent with equity and good conscience."

The defendant, in his answer, sets forth the chain of title, and the agreements and deeds under which he claims the lands therein specified and described ; and he admits the

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amount of rent chargeable upon each piece of land, and which he agreed to pay to the plaintiffs' testator, and insists upon damages, by way of compensation, and set-off, against the rent in arrear, for the right of common pasturage, and of estovers, in the waste and unappropriated lands of the manor, and of which he has been deprived by the acts and enclosures of the proprietor of the manor.

No proof has been taken in the cause, and the case has been submitted upon the pleadings.

The defendant appears to be indebted to the plaintiffs, as executors of *R. T. Livingston*, deceased, for the rent of ten pounds a year, from the 1st of *January*, 1795, for the *Coinc* farm, and the rent of seven pounds a year for the same period, for two tracts of land adjoining the same, and the rent of twelve pounds a year, from the 1st of *July*, 1796, for the *Cole* farm. There is no pretence that any part of this rent has been paid, but the defence consists of the following particulars :

1st. That the requisite discovery having been obtained, the bill ought to be dismissed, and the plaintiffs sent to law, where their remedy is complete.

2d. That if an account of the arrears of rent is to be taken, an account ought, also, to be taken of the damages for the loss of the common of pasture, and of estovers, and the same be allowed, by way of set-off, against the rent.

3d. That the rent is to be presumed paid and satisfied by the lapse of time.

1. If the defendant intended to have objected to the jurisdiction of the Court, he should have demurred to so much of the bill as prayed relief. It is a general rule, that he comes too late with this objection at the hearing, after he has, by his answer, put himself upon the merits. (1 *Johns. Cas.* 434. 2 *Johns. Cas.* 431. 10 *Johns. Rep.* 595, 596. 2 *Johns. Ch. Rep.* 369.)

Rent is recoverable in equity, where the remedy has become difficult or doubtful at law, or where the premises are

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uncertain. In the case of *The Duke of Leeds v. New Radnor*, (2 Bro. 338. 519.) the bill was for a fee-farm rent, and the answer admitted the title, and the arrears, but insisted that the land had not undergone any alteration as to boundaries, and that the plaintiff's remedy was at law. The Master of the Rolls thought it was not of course, for equity to interpose in cases of rent, and where the plaintiff has his remedy at law, but he retained the bill for a year. On appeal, Lord *Thurlow* said, there were a great many cases of bills for rent, where the remedy at law was lost, or deficient, or the premises uncertain; and as the defendants, by their answer, had admitted the right of the plaintiff, he decreed an account of the rent, with costs. The same doctrine was advanced in *Benson v. Baldoyn*, (1 Atk. 598.) and in the early cases in Chancery, (*Collet v. Jaques*, 1 Chancery Cas. 120. *Davy v. Davy*, 1 Ch. Cas. 144. *Coeles v. Foley*, 1 Vern. 359. *Steward v. Bridger*, 2 Vern. 516.) In *North v. Earl of Strafford*, (3 P. Wms. 148.) there was a bill for quit-rents, on the ground of uncertain and perplexed boundaries. There was a demurrer put in to the relief, because the remedy, for the arrears of rent, was at law; and Lord *King* held the demurrer to be good, but observed, that if there had been no demurrer, the Court, on the hearing, would have relieved. The jurisdiction of the Court was discussed by Lord *Talbot*, in *Holder v. Chambury*. (3 P. Wms. 255.) That was a bill for arrears of a very small quit-rent by the lord of the manor. No difficulty was stated in the bill to the recovery at law, but the defendant, in his answer, said he was willing to pay. The Chancellor said, a bill was proper where the lands, or the days of payment, were uncertain, but it was vexatious where the remedy was plain and easy at law. "However," he observed, "I do not see that it will be for the defendant's benefit to dismiss this bill, as to this quit-rent, for then the plaintiff would immediately sue for it at law." He, accordingly, directed that

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the arrears of rent be computed *by the Register*, and that the plaintiff's right should be established without costs.

In the present case, it is sufficient to sustain the bill, and decree an account to be taken of the arrears of rent, that the defendant has submitted to the jurisdiction, and has not demurred. But independent of that admission, I cannot consider the resort to this court as vexatious and unnecessary, considering the apparent perplexity and uncertainty of the title, and of the extent of the defendant's responsibility. As the defendant has admitted the amount of rent payable by him for each farm, and the time from which it was to be paid, what utility or justice would there be in sending the plaintiffs, who are executors, to seek a remedy at law, under the covenants, or under the admissions in the answer? According to the cases which have been referred to, this would not be pursuing the established course and practice of the Court.

2. The next point is, whether an account is to be taken of the damages for the loss of the commons.

The answer to this objection is obvious and decisive.

The Court would be obliged to direct an issue, to try whether the defendant had a right of common, after the inclosure and improvement of the waste and uncultivated lands of the manor, and if he had, then whether any or a sufficient common had been left, and if not, then as to the amount of damages. These are nice and strictly legal questions, and the course has been to refer them to a Court of law. (*Weeks v. Staker*, 2 Vern. 300. *Arthington v. Fawkes*, 2 Vern. 358.) Nor is this a case of mutual debt or credit proper for an equitable set-off. It is a case of uncertain and unliquidated damages, even if the doubtful legal right was established. And it is well understood, that uncertain damages are not a proper subject of set-off in this Court, any more than at law. (*Duncan v. Lyon*, 3 Johns. Ch. Rep. 351.) In *Watts v. Coffin*, (11 Johns. Rep. 495.) it was held, that a violation of a covenant on the part of the grantor, to allow common of pas-

ture, and of estovers, was no defence to an action for the recovery of rent.

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There never was a case of set-off in equity where the damages proposed to be set off against a clear and certain debt, were unliquidated, and depended upon an unsettled legal right, of doubtful aspect.

3. The last objection is of no force. How can the lapse of time be brought in as presumptive evidence of payment, when the defendant, in his answer, admits the original covenant to pay, and does not pretend to any payment? Time operates in equity only by way of evidence, and here is only, as to one deed, *twenty* years and a few months, between the date of the covenant and the filing of the bill; and it is short of *twenty-two* years, in the other cases.

I shall accordingly direct a reference to a master to compute the arrears of rent, and the defendant may show, before him, any actual payments of rent, if any have been made. I shall direct the computation to be made without interest, for, as Lord *Nottingham* said, when he made a similar decree, in *Boteler v. Massey*, (*Cases temp. Finch*, 241.) "it was the plaintiff's neglect that he did not recover the rent sooner."

Decree accordingly.

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*The Executors of R. T. LIVINGSTON against HENRY LIVINGSTON and others.*

If a bill for discovery and relief be good as to the discovery, a general demurrer to the whole bill is bad.

If relief, as well as discovery, be founded on the fact of a lost deed, there must be an affidavit of the loss.

Where, on a perpetual lease, reserving an annual rent, no rent had been demanded for *forty-four* years from the date of the lease, on bill for a discovery, on the ground of a loss of the counterpart of the deed, it was *held*, that the lapse of time was sufficient evidence that the rent had been extinguished by some act or deed of the party entitled to it.

January 14th.

THE bill, filed October 29th, 1817, stated, that *Robert Livingston*, jun. proprietor of the manor of *L.*, by a deed dated the 10th of *September*, 1773, conveyed a tract of land in the manor, containing about 500 acres, to his son, *Henry Livingston*, in fee, reserving an annual rent of seven pounds ten shillings, for ever. That by devise, &c. *R. T. Livingston* became seised of the rents of the said premises, and devised the same to the children of *Mary Crafts*, (except *R. T. C.*) and died in 1814. That the children are all infants, and the plaintiffs are executors and trustees, &c. That the said deed is in the possession of the defendant *H. L.*, and the counterpart thereof has not come to the knowledge or possession of the plaintiffs. That the premises are in possession of the other four defendants, who claim to hold as tenants under the defendant *H. L.* That no rent has been paid by either of the defendants, since the date of the lease, either to the grantor, or to any person, since his death, &c. *Prayer*, that the defendants may discover whether *R. L.* did not convey the premises, as stated, to the defendant *H. L.*, with the reservation of the annual rent mentioned; whether the four



other defendants are not in possession of the land ; and whether the rent is not charged thereon, and the plaintiffs entitled to the same : and that the defendants might set forth their titles to the land in their possession, respectively, &c. That the defendant *H. L.* might set forth an account of payments by him, and of the arrears of rent due, &c. And that the plaintiffs may have such other and further relief as the case may require.

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*Demurrer* by the defendant *H. L.*, because, the bill contains no matter of equity sufficient to afford any ground for a decree against him ; because, the children of *Mary C.* are not parties to the bill ; because, the rent claimed, if due, is recoverable at law, and whether due or not, is triable at law ; and because, the lapse of time, since 1773, forms an equitable, as well as a legal bar, to the claims set up by the plaintiffs.

The other defendants answered, and stated, that they occupied distinct parts of the premises, by leases under the defendant *H. L.*, and had paid him the rent charged by him. That they never had been called on by any other person for rents. That the rent of 7*l.* 10*s.* nor any other rent reserved by the grantor, had ever been demanded of them ; and that they claimed no title to the premises, except as tenants under *H. L.*, and that they had no title deeds to set forth, &c.

*Van Buren*, for the plaintiffs.

*E. Williams*, for the defendants.

THE CHANCELLOR. The prayer of the bill is for discovery, and for relief consequent upon that discovery.

The bill states, that *Robert Livingston*, jun., proprietor of the manor of *Livingston*, conveyed about 500 acres of land in the manor, to the defendant *Henry Livingston*, by deed, on the 10th of *September*, 1773, and that he reserved an annual rent of 7*l.* 10*s.* to him and his heirs, which

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the defendant covenanted to pay. The grantor died in 1780, after having devised the rent to his son, *Peter R. Livingston*, for life, and then to his grandson, *Robert T. Livingston*. *P. R. L.* died in 1794, and *R. T. L.* in 1814. The latter devised the rent to his children, but directed, by his will, that during their infancy, the rent should be received by the plaintiffs, his executors; and the bill avers, that the children are still minors.

The only fact alleged, as a reason for coming into this Court, is, that the plaintiffs are not in possession of the counterpart of the original deed, and have no knowledge of it. It is stated, that no rent has ever been paid since the date of the grant, but it is not alleged, that any has ever been demanded. The defendant, *H. L.*, demurs generally to the whole bill, and assigns, among other reasons, that the bill has no equity to entitle the plaintiffs to discovery or relief, and he relies upon time as a bar to the claim.

The rule with us, as settled in the Court of Appeals, (*Laight v. Morgan*, 1 *Johns. Ch. Cas.* 429.) is, that if a bill for discovery and relief be good for discovery, a general demurrer to the whole bill is bad. The *English* rule introduced by Lord *Thurlow*, is contrary to the ancient practice which we have followed. It is held, in *England*, that upon a bill for discovery and relief, if the plaintiff be not entitled to relief, he is not entitled to discovery, and a general demurrer to the whole bill will lie where the plaintiff, though entitled to the discovery, is not entitled to the relief. (17 *Ves.* 216. 2 *Ves. & Beam.* 238. 1 *Swanton*, 299. 9 *Ves.* 75.) There may be something said on each side of this point of practice, but we must follow the ancient rule as adopted here; and we have no reason to be ashamed of the old rule, when we have such a sanction to it as the opinion of Lord Ch. B. *Comyns*, (*Com. Rep.* 667, 669.) that "it would be unreasonable to refuse the aid a party is in conscience entitled to, because he asks something

more." The question then is, whether the plaintiffs, upon their bill, be entitled to discovery?

If relief be sought, as well as discovery, founded upon the fact of a lost deed, an affidavit of the loss ought to have been made. (*Laight v. Morgan*, 1 Johns. Cas. 479.)

In *Collet v. Jaques*, (1 Cases in Chancery, 120.) the bill was for arrears of rent, on the suggestion, that the deeds by which the rent was created were lost, and there was proof of the constant payment of it till the last twelve years. The Master of the Rolls decreed payment of the arrears and growing rent. But in *Palmer v. Whettenhal*, (1 Cases in Chancery, 184.) a different decree was made, under circumstances very analagous to the present case. The plaintiff, as heir to his brother, claimed a rent of seven pounds *per annum*, and it was averred to have been paid by the owner of the land until within thirty years, and that the land charged with the rent had passed through several persons, and came to the defendant; and the bill prayed, that the rent and arrears might be decreed to be paid. The defendant demurred, and alleged, that he, and those under whom he claimed, had enjoyed the land for thirty years, without any demand of rent, and that being so long unpaid, it was presumed to be extinguished. On debate, the demurrer was allowed by Sir Orlando Bridgman, the Lord Keeper. Again, in *Boteler v. Massey*, (*Rep. Temp. Finch*, 241.) the Court supported a claim for a dormant rent, on a bill founded on the loss of the counterpart of the deed, and so far the case resembles the one before me. But in that case the rent had been paid for many years, and until within twenty-three years of the time of pronouncing the decree.

The case of *Collins v. Goodall*, (2 Vern. 235.) is too brief to give much light on the subject. The bill was to be relieved touching a rent charged upon lands, and the defendant pleaded the statute of limitations, and that there had

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been no demand or payment in forty years; and the Court merely say, that the case in *Coke*, on the statute of Hen. VIII. did not apply to rent commencing by grant. What became of the case, does not appear; the note of *Raithby* only says, that after demurrer the defendant had been ordered to answer, and that the benefit of the demurrer was saved to the hearing. The decree, in *Steward v. Bridger*, (2 Vern. 516. note.) contains a principle of much good sense, and strongly applicable. It declares, that an annual rent for certain copyhold lands, had been paid to the plaintiff as owner of the manor of *Dean*, for twenty-four years, and upwards; and that no demand had, in all that time, been made, of any annual rent out of the premises, payable to the manor of *Ipeing*, (though it was admitted the copyhold was held of the manor of *Ipeing*;) and that this was "a strong evidence of a severance of the said annual quit-rent from the said manor of *I.*, by some grant or conveyance," and the arrears were decreed to the plaintiff.

Upon the application of the doctrine contained in some of these decisions, to the present case, I am disposed to reject this bill. Here has been no rent paid or demanded, for forty-four years before the filing of the bill; and this case is to be distinguished from all the others, in this peculiar circumstance, that no rent has ever been paid or demanded from the beginning. The presumption is very strong of an extinguishment of the rent, by some grant or conveyance. The original grantor lived seventeen years after the execution of the deed, and no rent was demanded or paid. His son lived four years after his father's death, and the same silence was preserved; and his grandson, who was entitled to the rent, if any existed, lived twenty years after he became so entitled, and there was no demand or payment. At this late day, the representatives of the grandson call on this Court to help them to recover this rent, on the ground, that they can find no counterpart of the deed. The presumption is, that it has been surrendered or cancelled, and the rent extinguish-

ed by some act or deed of the party having a right to extinguish it. I think the decision of Sir *Orlando Bridgman*, is applicable and just. He allowed a demurrer to such a bill after thirty years, and here is a lapse of forty-four years, and an assumed claim floating unheeded through three generations. Lord *Hardwicke* observed, in *Benton v. Baldwin*, (1 *Atk.* 598.) that Chancery interfered to help the payment of a sleeping rent, "upon the foundation only of payment of rent for a long time, which bills are called bills founded upon the *sole*."

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The difference between this case and the one decided yesterday, is very material. Here is a demurrer to the whole bill, and the great lapse of time taken as one ground in support of it, whereas, in the other case, the defendant, by his answer, admitted the covenants to pay, and put his defence on counter claims. Here is, also, a lapse of forty-four years, and there were only twenty or twenty-two years in the other case. Again, the claim here has passed through successive generations, and neither the grandfather, father, or son, as they were successively entitled, ever applied for rent, but in the other case the covenants to pay rent were with the plaintiffs' testator. There is no case that would warrant a denial of assistance, under the circumstances disclosed in the former case, but several that would require it; whereas here we have, at least, one case sufficiently in point, and none that have sustained a bill under such strong presumptions against it.

I shall, accordingly, decree that the bill, as to the defendant, *Henry Livingston*, be dismissed, without costs.

Decree accordingly.

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Rosse  
v.  
Rust.

Rosse and others, assignees of C. SNOW, against C. RUST  
and others, representatives of A. RUST.

Where a cause was set down for a hearing, on the bill and answer, and the bill was dismissed with costs, because no person appeared for the plaintiff, and the decree was enrolled, the decree was held to be no bar to another suit for the same matter.

Jan. 1834. THE bill, in this cause, which was filed the 19th of April, 1814, was substantially for the same matter for which a bill was filed on the 9th of June, 1810, by *Ephraim Snow*, against *Amaziah Rust*, which cause was set down for a hearing on the bill and answer, the 10th of September, 1812, when no person appearing on the part of the plaintiff, the bill was dismissed with costs; and the decree of dismissal was enrolled.

The defendants now pleaded the former suit, and decree therein, in bar.

*Tucker*, for the plaintiffs.

*Cady*, contra.

THE CHANCELLOR. The present suit is for the same matter, in substance, as that contained in the pleadings in the former action, and the question is, whether the decree dismissing the bill in the former suit at the hearing, (the cause having been set down for hearing by the defendant, upon leave previously had and obtained on a previous default of the plaintiff,) because no person appeared on the part of the plaintiff, is a bar to the present suit.

The merits of the former cause were never discussed, and no opinion of the Court has ever been expressed upon them.

It is, therefore, not a case within the rule rendering a decree a bar to a new suit. The ground of this defence by plea is, that the matter has been already decided, and here has been no decision on the matter. In *Brandlyn v. Ord*, (1 *Atk.* 571.) Lord *Hardwicke* said, "that where the defendant pleads a former suit, he must show it was a *res judicata*, or absolute determination of the Court, that the plaintiff had no title. A bill dropped for want of prosecution, is not to be pleaded as a decree of dismissal, in bar to another bill." The same doctrine is stated in Lord *Redsdale's* treatise. (*Misf. Pl.* p. 195.) The decree in this case was equivalent to a judgment of *non suit* at law.

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Plea overruled, and the defendants ordered to answer.

### BUSHNELL against HARFORD and others.

On a bill filed against the representatives of a grantee, to have a deed set aside and cancelled, on the ground of a fraudulent alteration, which was fully proved in this Court, and had, also, been proved in an action of ejectment brought by the defendants against the plaintiff, at law, and a verdict found for the tenant in possession, but the defendants, afterwards, had the deed proved by an aged witness, and recorded, and threatened to bring another action of ejectment; this Court ordered the deed to be cancelled as fraudulent and void, and the defendants to be perpetually enjoined from using the record of it as evidence of title.

And the decree was declared to be binding on the infant defendants, unless, on coming of age, they showed good cause to the contrary, on being served with process for that purpose.

The defendants, who were of age, and had not rested satisfied with the trial and verdict at law, were ordered to pay costs.

THIS was a bill to set aside, and to have cancelled, a deed, purporting to have been executed on the 6th day of January 26th.

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*February, 1790, by N. Gorham and O. Phelps, to William Ewing, in fee, for undivided parts of certain lots of land lying in the county of Genesee, and recorded in the clerk's office of that county, on the charge, that it had been falsely and fraudulently altered.*

The defendants were the infant children of *Ewing*, who was dead, and his wife, who had married the defendant *Harford*. The cause was put at issue, and proof was taken of the fraudulent alteration of the deed; and the fraud was shown to be of a very gross kind, and clear, beyond all contradiction. It appeared from the pleadings and proofs, that the defendants, *Harford* and his wife, had brought an ejectment suit upon the deed, which was tried at the *Genesee* circuit, where the felonious alteration of the deed was made out to the satisfaction of the judge and jury; and a verdict found for the tenant in possession. Since that trial, these defendants had procured the deed to be proved by a very aged subscribing witness, since dead, and to be recorded, and had threatened the prosecution of a new action of ejectment.

The cause was submitted upon the pleadings and proofs.

*Henry*, for the plaintiff.

*J. C. Spencer*, for the defendants.

THE CHANCELLOR thought it too clear a case to need discussion, and directed, that the deed, which was in Court, should be cancelled, as being a fraudulent, forged, and void deed; and that the defendants, and all persons claiming under them, should be perpetually enjoined from using the record of the deed as evidence of title, and that the decree should be binding upon the infant defendants, unless they should, within six months after they respectively attained the age of twenty-one years, upon being served with process for that purpose, show to the Court good cause to the contrary:



And inasmuch as the defendants, *Harford* and his wife, had not rested satisfied with the trial in the ejectment suit, but had since procured the deed to be proved by a very aged subscribing witness, since dead, without notice thereof to the plaintiff, and had caused the deed to be recorded, they were ordered to pay costs of this suit to the plaintiff.

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Decree accordingly.

**BROWN against W. & G. R. A. RICKETS, Executors of  
CATHARINE BREWERTON.**

An executor, or trustee, is not allowed to use the trust money, and retain the profits arising from it.

If he mixes it with his own money, and uses it in his business or trade, the profits of which are not known, he must pay *interest*.

But where there was no direction in the order of reference to the Master, to inquire into the use and profit of the fund, and he had charged the party with *interest*, the report, to prevent the effect of *surprise* on the party, was recommitted to the Master, to take further proofs or explanations, and correct any mistakes.

Where a plaintiff claimed as legatee and as a creditor, and proved only his right as legatee; and the defendants, *executors*, had caused great expense and delay, by raising unfounded objections, neither party was held entitled to *costs*.

THE Master, in pursuance of the decretal order in this cause, (*vide* S. C. vol. 3. p. 553.) by which he was directed, "to take an account of the proceeds of the fund created by the will of the testator, to pay legacies, and the amount of the debts and funeral expenses, and to make to the defendants all just allowances, and to examine the parties upon interrogatories, as he should deem necessary," reported a balance due to the plaintiff, out of the fund, of £936 dollars, *January 27th.*

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30 cents, and charged the defendants with interest on the net proceeds of the sales by them, of certain houses and lots in the city of *New-York*. The Master stated, as reasons for charging the defendants with such interest, that the legacies were directed, by the will, to be increased or diminished, as the fund increased or diminished, and that the legatees had the same right to such increase as to the original fund; and because those proceeds arose from what was previously productive either in rents or interest, and because the defendants had made use of the moneys belonging to the plaintiff.

The defendants were examined upon interrogatories before the Master, and stated, that as to the application and investment of the 3,500 dollars, bequeathed to the plaintiff, and to *William Brown*, deceased, whose right was claimed by the plaintiff as his administrator, "they had not made any particular application or investment thereof. That the fund, applicable to the payment of the legacies, to the plaintiff and *W. B.*, as it came into the hands of the defendants in money, was mixed with their own private funds, and may have been sometimes used by them in their business, though they were ready at all times to have paid the plaintiff out of the said fund, as the same came into their hands in cash, if he would have relinquished his claims upon the estate beyond the said legacy, and given the security required by law."

Exceptions were taken to the report, in regard to the allowance of interest: 1. Because, the order of reference contained no authority to the Master to charge the defendants with interest, and the decree of the Court had not established the plaintiff's right to interest; 2. Because, it was not a case in which, by the rules of the Court, interest was chargeable against the defendants in favour of the plaintiff; 3. That if chargeable, the mode of calculating it was inaccurate.

There were some other exceptions, which it is unnecessary to state.

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*S. Jones*, in support of the exceptions.

*Burr*, contra.

THE CHANCELLOR. It is the established doctrine of the Court, that an executor, or other trustee, cannot be permitted to convert trust funds to his own use, without being responsible for the profits of the money. He is not to make any gain to himself from the use of the funds, but it must all be accounted for to the *cestuy que trust*. So, if an executor, or other trustee, mingles the trust moneys with his own, so as to answer the purpose of credit, or if he puts the money in jeopardy, by involving it in the risk of his trade, he must answer for what it may reasonably be supposed to have made. I have had occasion frequently to lay down this rule; (*Dunscomb v. Dunscomb*, *Manning v. Manning*, and *Schiefflin v. Stewart*, 1 *Johns. Ch. Rep.* 510, 535. 623—629.) and it may be declared to be a principle of universal law, that a tutor, curator, or trustee, shall not make a profit of the trust money, and then retain the profits. Whatever interest the trustee made ought to be paid. Though it should even be proper to keep the money in deposit, yet if he did, in fact, make interest of it, he ought to pay it. He must not, in any event, be a gainer by his employment of the trust fund.

I am surprised, that this point should be again drawn into question, after what has been said and ruled in this Court, and considering how fully and explicitly the doctrine has been established in the *English* Chancery.

In *Ratcliffe v. Graves*, (1 *Vern.* 198. 2 *Ch. Cas.* 152.) as early as 1683, the Lord Keeper said, it was reasonable that executors, in all cases, should answer interest, if they

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had used the money of the testator in trade, or received any interest for it, and that they should not turn the same to their own private advantage. He ruled, that the administrator, in that case, should account for interest, unless he made out that he had kept the money by him. Afterwards, in 1706, in the case of *Lee v. Lee*, (2 *Vern.* 548.) the Lord Keeper decreed, that though a trustee, or executor, was not directed to place money at interest, yet, where he made interest, he should be accountable for it.

The practice, before the earliest of these decisions, had been different, and so it was stated in that case; and some of the observations of Lord *Hardwicke* (*Adams v. Gale*, 2 *Atk.* 106. *Child v. Gibson*, 2 *Atk.* 603.) would seem to be in contradiction to this salutary doctrine. He gives an extremely lax and dangerous license to executors, if we can possibly give credit to the accuracy of the reporter. But from the time of Lord *Thurlow*, we find the true doctrine of the court asserted with uniformity and precision, and placed upon the soundest principles of policy and justice.

In *Newton v. Bennet*, (1 *Bro.* 359.) the executor had moneys remaining, from time to time, in his hands, which he used in common with his own moneys, in the way of trade, and the question was, whether he should pay interest. Lord *Thurlow* admitted there were many sayings in the books, to prevent its being laid down as a general rule, that an executor should pay interest for money used in the course of his trade, and that he was required to say that an executor might keep the testator's money, and apply it to the uses of his trade, without being liable to interest. But, he said, "it was impossible this should have been laid down as the law of the Court;" and he charged the executor with interest, who had called in money, and made profit of it, in the way of his trade. In the subsequent case of *Perkins v. Baynton*, (1 *Bro.* 375.) the administrator had received money, and kept it, for five years, in his hands, and it was referred to a master to inquire whether he had made interest. The mas-

ter reported, that he had mixed it with his own money, and from time to time, had laid out the mixed fund in government securities, and had, therefore, made some interest, though he could not report what, in particular. The Lord Chancellor decreed, that he be charged with interest at four per cent., from the time the money came to his hands. Again, in *Treves v. Townsend*, (1 Bro. 384. 1 Cox, 50. S. C.) Lord *Loughborough* charged the assignee of a bankrupt with interest, when the money lay at his banker's, and he had been negligent in making a dividend. He observed, that the money of a merchant at his banker's, does not lie idle; it is part of his stock in trade; and when this cause came on to be heard before Lord *Thurlow*, it was moved for a reference, to inquire whether the assignee had made any, and what interest; but the Chancellor said the inquiry was totally out of the case, for the answer admitted sufficient, when it admitted that *he used the money in his own trade, in common with his own*, and he charged him with interest at five per cent. The same point was ruled in the case of *The Bankruptcy of Hilliard*; (1 Ves. jun. 89.) and in *Franklin v. Frith*, (3 Bro. 433.) the Chancellor charged an executor, with interest, who kept money idle at his banker's, and observed that "keeping money at his banker's, was no proof that he did not make interest of it."

In a recent case, before the House of Lords, (4 Dow's P. Rep. 131.) Lord *Eldon* declared the rule of the *English* law in a very emphatical manner. A trustee can make no profit to himself of the trust money; and if he offered to pay a certain rate of interest, the *cestuy que trust*, might say "No, you must account to me for all the profits you have made of my money, and I have a right to know from you what profits you have actually made of it, and if you have made ten per cent., I am entitled to it. If the use you made of it, was to make any particular rate of interest, then you must pay me that interest. If you have mixed my money with your

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own, so that you cannot distinguish what is yours, and what is mine, and cannot tell what profit you have made of my money, less than the legal interest, you shall pay me interest at five per cent."

In the case before me, the defendants were merchants. They are so designated in the testator's will. They convert into cash, in *May*, 1816, in pursuance of the directions of the will, several houses and lots in the city of *New-York*, and in answer to the question, what was done with that money, they say, "It was mixed with their own private funds, and may have been sometimes used by them in their business." There can be no doubt, from that admission, and from the cases which have been referred to, that they were properly chargeable with lawful interest; and the only difficulty that can arise in the case, proceeds from the want of a direction in the decretal order, to inquire into the use and profit of the fund in their hands. The defendants may have been taken by surprise, and not have been prepared to give more precise explanations on the subject. Lord *Thurlow*, in the case of *Treves v. Townsend*, after having charged the defendant with interest, offered to his counsel a reference to inquire into the rate of interest to be made by money so employed; and I think, that under the circumstances of the case, it would not be unreasonable to have the cause sent back to the master, to give the defendants all the opportunity they may want for explanation. The omission of any direction concerning interest in the former order, is the only reason for a further reference.

Question of  
costs.

The question of costs may still be reserved, though I think that neither party has just claims to any. The plaintiff has united with his demand of his legacy, a claim as a creditor, and has failed to establish it, and the defendants have caused delay and expense, by raising objections, in the course of the cause, without foundation. Though an executor may have a claim to costs, as far as goes to the taking

the account, yet, as Lord *Thurlow* observed, in *Newton v. Bennet*, on this point, it is difficult "to separate the expenses," and he refused costs to either party.

The following order was entered: "Inasmuch as the question of interest, with which the master has charged the defendants, and with which they ought to be charged upon the facts stated in the report, may have operated as a surprise upon the defendants, the same not being expressly mentioned in the decretal order directing a reference to the master in this case; to the end, therefore, that the defendants may have an opportunity to give further explanations, if any they have, touching the question of interest; it is Ordered, &c., that the said report, for that purpose, be re-committed to the master, and that he take such other and further proof, touching interest, chargeable to the defendants, as may be offered by either party, and that he allow or disallow interest, as the same, upon such further examination, shall appear to be just and equitable. And if interest be allowed, that he, at the same time, revise the mode of calculating it, and correct any mistake, if any shall appear, in such mode, &c."

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Decretal order.

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SHAYER  
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SHAYER and others against RADLEY and others.

If a trustee by implication, is to be affected by an equity, that equity must be pursued within a reasonable time.

Where the defendant, a *bona fide* purchaser without notice, and those under whom he claimed, had been in possession of land, above *twenty-six* years, before the plaintiffs filed their bill to enforce their claim, founded on an *implied* trust, the bill was dismissed, but without costs, under the circumstances of the case.

A defendant who answered an original bill, after a decree against him, petitioned for a *rehearing*, which was granted, and the plaintiffs filed a *bill of revivor and supplement*, to which the defendant answered and *disclaimed*, he was held entitled to costs, on the dismissal of the bill.

February 9th. THE original bill, filed March 8th, 1799, stated, that Andrew Makaus was seized of eighty acres of land in the Van Baal patent, in the manor of Rensselaer. That A. M., by his will, dated August 15th, 1749, devised one half of his land to his son Peter, in fee, and the other half to his daughter Annatie. The testator died, and his son, also, died, soon after. Annatie married John Radley, and their children, and the children of another daughter, Maritie, who married Abraham Bradt, were plaintiffs. Elizabeth, another daughter of the testator, died intestate. A dispute arose about the boundaries of the Van Baal patent, which was submitted by the proprietor of that patent, Van Rensselaer, to commissioners, in 1774, who awarded the said farm to S. Van Rensselaer, the proprietor of the manor, who was bound by a stipulation in the submission, to confirm the title of the grantees under the Van Baal patent, subject to the like rents and conditions used in the manor leases. In pursuance of the award, the proprietor of Van Baal's patent, on the 14th of March, 1789, assigned the counterpart of the lease to the testator, in fee, to the pro-

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prietor of the manor of *R.* The original lease to the testator, was dated *October 19th, 1732.* The two devisees took possession of the farm, and enjoyed it, until the death of *Peter*; and *Annatic* continued in possession until her death, which was long before the filing of the bill. Her husband, *John Radley*, who survived her, married a second wife, by whom he had issue, and who are the defendants. The bill further stated, that *John Radley*, having obtained the title deeds and will of *A. M.*, destroyed them. That he continued in possession until his death, in 1785, and that the defendants, or some of them, have since continued in possession. That *J. R.*, or his last wife, or the defendants, after their death, by false suggestions that they were the legal possessors, obtained from the proprietor of the manor of *R.*, a deed, in fee, for a tract of land, including the *eighty acres*, subject to an annual rent, &c.; and under that deed keep possession of the said eighty acres, and refuse to produce or to admit the title deeds and the will of *A. M.*, so that the plaintiffs are unable to recover the farm or rents at law. *Prayer*, for discovery and relief.

The four defendants, on the 2d of *September, 1799*, put in their answer, stating, among other things, that they did not know, or believe, that *A. M.* died seised, or made a will, &c. and set forth their title as derived under the will of their father.

They denied the suppression of the will. They admit, that in 1773 the widow of the proprietor of the manor of *R.*, gave a lease to their father, of 100 acres of land, including the eighty acres, for thirteen years; and that, in 1791, the present proprietor of the manor, gave to their mother a new lease, for 220 acres, including the eighty acres, in fee, subject to an annual rent of thirty skipples of wheat, &c. They denied, that any false suggestions were made, &c.

Witnesses were examined, and publication passed, and the cause brought to a hearing, before the late Chancellor,

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in 1813, when it was decreed, that the defendants, and their wives, should release to the plaintiffs, two undivided third parts of the eighty acres, and deliver possession thereof; and a reference was made to a Master, to state an account of the rents and profits received by the defendants.

On the 19th of *September*, 1814, three of the defendants, one having died in the mean time, presented a *petition* for a rehearing, in which, among other things, they stated, that the property in the eighty acres of land, were vested in the defendant, *William Radley*, and the other defendants had no interest, &c.

A *rehearing* was ordered, and the defendants had leave to amend their answer, and the plaintiffs had leave to file a *bill of revivor and supplement*; the depositions taken, to be evidence, and the motion as to costs of the petition reserved, &c.

On the 1st of *August*, 1816, the plaintiffs filed their bill of *revivor and supplement*, stating additional plaintiffs, and various changes by death and marriage, and deducing title to the plaintiffs. They repeated the charges in the original bill, &c.

*William Radley* put in his separate answer to the bill of revivor, &c. And the other two defendants answered, and disclaimed, and prayed for costs.

The material facts appearing in the pleadings and proofs, which were very voluminous, are sufficiently stated in the opinion of the Court.

*Van Vechten*, for the plaintiffs.

*Burr*, for the defendants.

THE CHANCELLOR. 1. If the land in question had belonged to the *Van Baal* patent, and not to the manor of *Reusselaer*, and *Andrew Makaus* had been legally seized in fee, at the time of his death, the plaintiffs, who are chil-

dren of *Annatie Radley*, would have shown a title to a moiety of the premises.

By the will of *Makanse*, (and of the authenticity of which there can remain no doubt,) the one half of the farm was devised to his son *Peter*, and the other half to his daughter *Annatie*. There is no evidence that *Annatie* ever parted with her right, but there is ground to presume that *Peter* conveyed his interest to *Johannis Radley*, the husband of *Annatie*, and father of the defendants. There is a certificate signed by *Mary* and *Elizabeth*, the two other daughters of the testator, and dated in 1759, by which they and their husbands acknowledge to have received of *Johannis Radley* their full demand upon the farm, and they assign over all their right and title to him. By the will, those two daughters were entitled to a legacy of ten pounds each; the one legacy payable by *Peter*, and the other by *Annatie*. These legacies, which were paid by *Radley*, in 1759, were paid on behalf of *Peter*, and of his wife *Annatie*, and how came he to pay the legacy chargeable upon *Peter*? We find, also, by a receipt dated in 1756, that *Johannis Radley* paid a small debt of *A. Lansing*, against *Peter Makanse*; and by another receipt, of the date of *February*, 1763, he paid to *Dow Fonda*, a debt due from *Andrew Makanse*; and by a receipt, of *May*, 1763, he paid another such debt to *Mary Bett*; and by a receipt of 1768, he paid another such debt to *A. Yates*; and by another receipt, of 1777, he paid another such debt to *Jacob Roseboom*. A number of aged witnesses testify to traditional information and belief, that *Johannis Radley* acquired the farm by purchase, and assumed the debts of the testator; and, though they do not speak with precision, their testimony shows that there was an ancient and generally received impression in the neighbourhood, to that effect. It appears, also, that *Johannis Radley* continued in possession, from the time he first entered, not long after the death of *Makanse*, until his death, in 1785, a

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period of upwards of thirty years. I think we might safely presume, under these facts and circumstances, that a conveyance of *Peter's* moiety of the farm, was made to him, and that the deed has been lost. As to the moiety of *Annatie*, his continuance in possession until his death, would be perfectly consistent with her right, and that of her children, inasmuch, as he was entitled to such possession, as tenant by the curtesy.

Assuming, then, the *Makanse* title to have been good, I should be induced to think that the plaintiffs, who are the children or descendants of *Annatie*, have shown a title to a moiety of the premises, and that the plaintiffs, who are the children or descendants of *Maria*, have failed in establishing any title, legal or equitable.

2. But it appears, from the case, that the *Makanse* title was without foundation; that the lands in question belonged to the proprietor of the manor of *Rensselaer*, and that the defendant, *William Radley*, is lawfully possessed of a lease, in fee, under the true owner; and the only point in the case is, whether the facts will raise a trust, by construction, as to a moiety of the premises, in favour of the representatives of *Annatie Radley*.

The charge in the bill, that the parents of the defendant, *William Radley*, suppressed the will and title deeds of *Andrew Makanse*, and obtained a title under *Van Rensselaer*, by false suggestions, is not supported by proof. It appears that disputes and controversies existed between the proprietors under the *Van Baal* and *Van Rensselaer* patents, and ejectment suits had been brought on each side. In July, 1774, the proprietors submitted the dispute to arbitration, and by the award of the referees, in May, 1775, the lands now in question were declared to belong to the manor of *Rensselaer*. It is suggested, that, by the terms of the submission to arbitration, the title of the grantees under the *Van Baal* patent was to be confirmed, under the like rents and conditions, in case those grantees should fall within the

manor of *Rensselaer*. But neither the defendants, nor their parents, (*Johannis Radley*, and his second wife, *Catharine*,) were parties to that submission, and there is no evidence that the knowledge of such a stipulation ever came to them, or either of them, and the fact of such knowledge is denied in the answer. When *Johannis Radley* obtained a lease, in 1773, from Mrs. *Van Rensselaer*, for thirteen years, he acquired a title by purchase from the true owner, upon the usual covenants and conditions contained in the printed leases, and upon a yearly rent of fifteen skipples of wheat. This appears to have been a fair purchase, and without any ground upon which to raise a trust, in favour of the plaintiffs, under *Makanse*. The title under *Makanse* was denied, and resisted, and proved, afterwards, to have been null and void from the beginning. It was a safe and necessary purchase under the rightful owner; and the suggestion of a fraudulent attornment is not supported. If there was any fraud, it was committed against the proprietors of the *Van Baal* patent, who were seised of the rents under the original lease to *Makanse*; and they would be concluded from the suggestion, since they submitted their title to a tribunal which decided that they had none. The taking a lease under the true owner, was a *tabula in naufragio*. His tenancy by the curtesy was unsound and worthless; and the mere fact of his being an occupant under such a pretension, would not render him a trustee under the new lease. The claimants, under *Makanse*, had no title, in law or equity, to a confirmation of their lease by the true owner, unless under some covenant to that effect, and to that the *Radleys* were strangers. It does not appear that the lease was given to *Johannis Radley*, upon any other ground than that of his being a person in actual possession, which, of itself, gave him no legal or equitable right to the lease. He died in possession, before the expiration of the lease; and sometime after his death, his widow, *Catharine Radley*, procured from *Van Rensselaer*, in 1791, a lease in fee, subject to a variety of

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covenants and conditions; and among others, to the payment of an annual rent of thirty skipples of wheat. This lease, in fee, to *Catharine Radley*, was not in pursuance of any stipulation in the submission to arbitration. There is a great difference, both as to the quantity of land, and as to the rents and covenants, between this lease and the one in 1732, to *Makanse*, the counterpart of which had been assigned to *Van Rensselaer*, in 1789. There is no analogy between them. This is to be considered, not as the confirmation of the same grant, but as a new and original purchase made by the grantee, in good faith, and without knowledge of any legal obligation in *Van Rensselaer* to give it. She afterwards, conveyed the premises to *Rybert Radley*, and he to the defendant, *William Radley*, who holds as a *bona fide* purchaser, without notice of any trust arising from the terms of submission to arbitration, and without being chargeable with any fraud that might have been imputable to his father.

The interval between the time when *Johannis Radley* took a title under *Van Rensselaer*, and the filing of the bill, was twenty-six years; and during all that time, the land was held under *Van Rensselaer*, without notice of any equitable claim, which the grantees, under the *Van Baal* patent, might have had, arising from the submission to arbitration. I do not see that there is any principle of the Court to warrant the deduction of a constructive trust, to be enforced against the defendant. If a trustee by implication, is to be affected by an equity, that equity must be pursued within a reasonable time. (*Townshend v. Townshend*, 1 *Cox's Cases*, 28. and see, also, the cases referred to in 3 *Johns. Ch. Cas.* 216.) Here the defendant stands in the character of a *bona fide* purchaser, without notice, and he sets up such a purchase, and the occupation of the land by himself, and those under whom he holds, for a period of twenty-six years before the filing of the bill. I am of opinion, that he ought

not now to be disturbed, under the peculiar and extraordinary circumstances of the claim.

The bill must, accordingly, be dismissed; but considering the protracted nature of this litigation, arising from the acts and *laches* of the defendants, and the circumstances of hardship and misfortune which characterise the lost claims and equity of the children of *Annatie Radley*, I shall follow the precedent of the case just cited, and dismiss the bill without costs.

The two defendants who have, in their answer to the bill of revivor and supplement, disclaimed all interest in the premises, might have been entitled to costs, if that last bill had been the commencement of the suit. But when it is recollected, that in their answer to the original bill, there was no such disclaimer, and that a decree, after a hearing on the merits, had been pronounced against them, and that on their petition for a rehearing, they were indulged with the privilege of amending their answer, and might justly be chargeable with costs of the preceding part of the suit; they can have no just right to the costs of the last stage of the suit, if they are permitted to be exempted from the payment of the costs of the former stage of it. The bill, therefore, as to all the defendants, is dismissed without costs.

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On dismissal of bill, *costs* denied to defendants, on the ground of *laches* on their part, and hardship on the part of the plaintiff.

A defendant who answered an original bill, after a decree against him, petitioned for a rehearing, which was granted; and the plaintiff filed a bill of revivor and supplement, to which the defendant answered and disclaimed; he was held not entitled to costs, on the dismissal of the bill, but was exempted from costs under the first decree.

Decree accordingly.

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C. DUMOND, surviving Administrator of A. DUMOND, against  
MAGEE and others.

A Court of equity will lay hold of the property or money of a wife, which may be within its power, for the purpose of providing a maintenance for her, when she is abandoned by her husband, or prevented from cohabitation with him, by his ill-treatment.

Where a husband abandoned his wife, and married another woman, with whom he had continued to live for twenty years, he was held to have forfeited all just claim to the wife's distributive share to personal estate inherited by her. The Court directed the principal of such share to be brought into Court and placed at interest, and the interest to be paid to the wife, for her support, during life; and after her death, the principal to go to her children, by her lawful husband, or to their representatives; (she having, after being so abandoned by her husband, upon report and belief of his death, married another.)

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THE bill, filed August, 1816, stated, that *Anthony Dumond* died, unmarried, and intestate, on the 3d of November, 1814, possessed of a considerable personal estate, &c. leaving a mother, *Catharine Dumond*, and two sisters of the half blood, *Maria* (the assumed wife of *Samuel Magee*, of *Catskill*) and *Catharine*, the wife of *Thomas Harrett*, residing in the state of *Ohio*. Administration was granted to the plaintiff, and to *Catharine*, the mother of the intestate, who died in May, 1816, having devised her share of her son's personal estate, to the plaintiff and others. (And this third the plaintiff was ready to distribute among the parties interested, and as to which there was no controversy.) The bill further stated, that *Samuel Magee*, defendant, claiming to be husband of *Maria*, defendant, had applied to the plaintiff, for one third of the personal estate of the intestate. That the plaintiff knew that the defendant, then *Maria Dumond*, married *John Burhanse*, defendant, by whom she had



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three children, one of whom died without issue, and the other two were living. That the defendant, *John Burhanse*, who was living, had, by his trustee, *Jabez D. Hammond*, defendant, demanded of the plaintiff, the one third of the personal estate, as lawful husband of the said *Maria*. That the defendant *Magee* pretended to have married the defendant *Maria*, in 1799, and she has cohabited with him since. That the defendant, *John B.*, has always lived in this state, and was deserted by the said *Maria*, in 1792, and that the marriage between the defendants *Magee* and *Maria*, was unlawful. That the defendant *Magee*, set up a release of all the right and interest of *J. B.*, but that *J. B.*, and his trustee, *Hammond*, averred, that the assignment to *Hammond*, in trust, is prior in time, and that the assignment to *Magee* was procured by duress and fraud. That *T. Harrett*, who married *Catharine Dumond*, resides in *Ohio*, and they have two children; that their son, by virtue of a power of attorney from his mother, claimed her share. That the plaintiff was lately cited before the surrogate of *Ulster* county, to account and distribute, at the instance of the defendants, *Magee* and *Maria*, and *A. Harrett*, as attorney of *Catharine H.* That the plaintiff cannot safely distribute, until the claims of *Magee* and *Maria*, and the other defendants, are decided; it being uncertain, also, from contradictory reports, whether *Thomas H.* was living. The plaintiff asked for the decision of the Court on these conflicting claims, and for its protection and indemnity. Prayer, that the surrogate of *Ulster* may be enjoined from proceeding, &c. and for general relief, and an order for distribution, as this Court shall decide and settle the rights of the parties claiming, &c.

The defendants, *Samuel Magee*, and *Maria*, in their answer, stated, that she was lawfully married to *John Burhanse*, at *Kingston*, in *Ulster* county, in 1781, and lived with him until 1786. That *Burhanse* then left his wife and her two children, destitute, and she was taken home to her father's

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house. That they, afterwards, lived together for two years, at *Brooklyn*, but that he behaving in an adulterous and cruel manner towards her, she returned again to her father's house, with her two children. That she was, afterwards, persuaded to live with him in *Scoharie*, but he again neglected and abandoned her, and she again returned to her father's house, in 1792, which was their final separation. That several years, afterwards, and before her marriage with *Magee*, she was informed, and believed, that her husband *B.* was dead; and in 1799, she married the defendant, *Magee*, with whom she has since lived, with the two children, she had by *B.* That they never heard that *B.* was alive, until about five years ago. That about twenty years ago, (and before the marriage of the defendants, *Samuel Magee* and *Maria*,) *Burhanse* had married another wife, by whom he had a daughter, now seventeen years of age. These defendants then stated facts relative to the two deeds of assignment by *Burhanse* to *Magee*, and to *Hammond*, which, from the decision of the court, it is unnecessary to notice. The other defendants having answered, the cause was put at issue, and proofs taken. The material parts of the evidence are stated in the opinion of the Court.

*Sudam* for the plaintiff.

*M. I. Cantine*, for the defendants, *A. Harrett*, and *Magee* and wife.

*J. D. Hammond*, for the other defendants.

THE CHANCELLOR. This is a bill filed by the plaintiff, as administrator, for direction to whom to pay the two distributive shares of the personal estate of his intestate, which descended, by law, to the next of kin, being the defendants *Maria* and *Catharine*, the two sisters of the half blood.

There can be no doubt that the defendant, *Catharine Harrett*, is entitled to her share, in her own right ; for it is very clear from the proofs, that her husband, *Thomas Harrett*, is dead, and was so when the share descended to her. The course of duty, on this point, was so plain, that there seems to have been no sufficient ground for delay, or for application to this Court. But the conflicting claims as to the other share, were of a nature to create reasonable doubt and difficulty.

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I place entirely out of view all pretensions of the defendant *Magee*, as the assumed husband of *Maria Burhanse*, for her lawful husband, *John Burhanse*, being living, and she having never been divorced from him, her cohabitation with *Magee* is adulterous and unlawful. If he has any colour of claim to her distributive share, it is derived from the act and deed of her husband, *Burhanse*. But it appears, from the circumstances of the case, that *Burhanse* has no right or title which the Court can recognise and protect, and, consequently, he had none which he could impart to another. I am, therefore, relieved from the necessity of discussing and deciding on the force and effect of the two deeds executed by *Burhanse*, and to which a great part of the testimony is directed.

It is manifest that *Burhanse* behaved extremely ill to his wife before their final separation. The separation was rendered necessary on her part, by his omission to treat her with that kindness and fidelity, and to afford her that protection and support, to which she was entitled. Though I am obliged to condemn her subsequent connection with *Magee*, as altogether inadmissible, her situation is one that entitles her to tenderness and compassion. She says, in her answer, that she did not marry *Magee*, until several years after her separation from *Burhanse*, and until she was informed, and believed, he was dead. It was her misfortune to have been deceived by such information ; and though it

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may be sufficient to exempt her from guilt, it cannot give any validity to the second marriage, which was, and is, of course, null and void. The case affords too much colour for the inference, that the defendant *Maria* did not take proper pains, nor make due and requisite inquiry, to ascertain the fact of her husband's death, whom she had left residing in a neighbouring county. I am very apprehensive that she reposed with too willing a disposition, and in too careless a manner, upon some loose, and certainly groundless report, without that vigilance of examination which was required in a matter of such interesting moment to her character and conscience.

On the other hand, the conduct of *Burhanse* has been such as to deprive him, in equity, of all just claim to his wife's distributive share. The separation between him and his wife, was owing to his own misconduct; and he has married another woman, and lived in unlawful and adulterous connection with her, for the last eighteen or twenty years. To allow him to come in and maintain his claim, as husband, to the personal estate inherited by the defendant *Maria*, as late as 1814, after he has ceased to maintain her or her children, ever since their separation, in 1792, and has, for that long space of time, wholly abandoned his connection and duties, as husband and father, would shock the moral sense of mankind, and be equally repugnant to the established principles and practice of this Court. It is the settled doctrine, that equity will lay its hands on the property or money of the wife, which is within its power, for the purpose of providing a maintenance for her, when she is abandoned by her husband, or prevented from cohabitation by his ill-treatment.

In *Nicholls v. Danvers*, (2 *Vern.* 671.) the wife was ill-used by her husband, and she parted from him. The wife's mother died intestate, by which one third of the personal estate came to the wife. A bill was filed by her and her brother, to have that portion paid to her, for her use and

maintenance. The husband had, on the marriage, made a suitable settlement upon her, and by a cross bill, he claimed this distributive share. The Lord Keeper decreed that the principal should be paid to a master, and placed at interest, and the interest paid to her for life, for her maintenance, and after her death to her husband, for life, and then the principal to their issue, and if no issue, then to the survivor of husband and wife. The costs of all parties, except the husband, to be paid out of the fund, but no costs were allowed to the husband.

This case is, in some respects, analogous, but there was not such a total and permanent abandonment of the wife, by the husband, as to deprive him of all claim upon the property. He was, nevertheless, postponed to the wife, as to the use of it, and to her issue, as to the principal. In the case of *Williams v. Callow*, (2 Vern. 752.) the husband had used the wife cruelly, and the Court decreed that the interest of a trust bond given for the wife's portion, should be paid to her for her separate maintenance; and it ordered the principal to be brought into Court, and to be paid to the survivor. So again, in *Newsome v. Bowyer*, (3 P. Wms. 37.) the control of the wife's portion of personal property, which came to her by inheritance during coverture, was taken from the husband, whose crimes had forced him to abandon her, and was appropriated to the use of the wife. The case was this; the husband had been attainted of felony and pardoned, on condition of transportation, and the wife became entitled to some personal estate, as orphan to a freeman of London, and it was claimed by the husband as being, by the pardon, capable to take. Lord Ch. King, though he thought it not a case of abjuration or banishment, ordered the money to be laid out in government securities by a master, and the interest and dividends paid to the wife, for her maintenance, until further order; and after the husband's death, he ordered the principal to be paid to

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the second husband of the wife, who, with the wife, had made application for it.

Here the doctrine is fully asserted and maintained, that the husband, by his abandonment of the wife, may lose all claim to the use and to the principal of her separate personal estate.

The case of *Cecil v. Juxon*, (1 *Atk.* 278.) contains the same principle. The husband left the wife and two infant children, and went abroad, and deserted them, for fourteen years. The wife was entrusted by her mother, with goods proper for the business of a milliner, and permitted to take the profits, for the support of herself and her children. The money she earned by her business, she loaned out. The husband returned and took away the proceeds of the stock lent to the wife; and a bill was filed against the husband for the amount of the money loaned, and for a re-delivery of the goods taken. Sir *Joseph Jekyll*, the Master of the Rolls, was of opinion, that as the desertion was proved, the Court would regard the acquisitions of the wife, in his absence, as her separate property, and not liable to the disposition of the husband, and that she was entitled to the goods taken, and to the money loaned; and he directed a reference, to ascertain what was due on the loan, and that the defendant should return the goods taken, or the value, if disposed of, without costs on either side. This case was cited in 3 *Burr.* 1779, and Lord *Mansfield* observed, that it was a case securing the wife's property, and that the wife's separate property had been secured, by a Court of Equity, in several cases.

I shall, accordingly, declare, that the two sisters of the half blood, *Maria* and *Catharine*, were each entitled to a third part of the personal estate of the intestate, and that *Catharine*, or her attorney and son, the defendant, *Anthony Harrett*, is entitled to her share, when ascertained, on giving the usual security to refund in case of debts. It may be a question whether the plaintiff ought not to pay interest and

costs to the defendant, *Catharine*, for so long withholding her share, upon pretences that were not solid; and I shall, therefore, direct the master to ascertain the amount of the two shares, and what use or disposition has been made of the property since it was payable and due from the plaintiff. I shall further declare that the defendant, *John Burhanse*, has forfeited all right and title, as husband of the defendant *Maria*, to her distributive share, and that the same ought to be brought into Court, and placed at interest, so that the interest may be paid to the said *Maria*, for her support, and the principal reserved for her children by *Burhanse*, after her death, on giving the like security to the plaintiff against debts of the intestate. It may, also, be a question whether the plaintiff ought not to have costs out of *Maria's* portion, by reason of the resort to this Court, to settle the various and conflicting claims upon that portion; but the defendants, *Magee* and *Burhanse*, are not entitled to costs for setting up and urging an inadmissible claim. Nor, on the other hand, has the plaintiff any such equity against them as to entitle him to costs from them. The most I can do is to dismiss the bill, as to them, without costs. Whether the defendant, *Hammond*, who defends the suit as a trustee for *Burhanse*, and to whom, as such trustee, the plaintiff, by his agreement of *November*, 1815, promised to pay *Maria's* share, may not be entitled to costs, either from the plaintiff, or from the fund, I shall reserve until the coming in of the report.

The following decree was entered:

"The cause having been heard upon the pleadings and proofs, &c.: it is declared, that the defendants, *Maria Burhanse* and *Catharine Harrett*, are each entitled, as sisters of the half blood of the intestate, *Anthony Dumond*, deceased, to an equal undivided third part of the personal estate of the said intestate, after payment of debts, and the legal charges of the administration, and such costs of this suit, if any, which

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the Court may hereafter direct; and that the defendant, *Anthony Harrett*, is entitled to ask, demand, and receive, by virtue of a power of attorney, for that purpose given him by the said *Catharine Harrett*, (and who is the widow and survivor of *Thomas Harrett*, deceased,) the share aforesaid, belonging to his mother, the said *Catharine*, after the same shall have been ascertained, as hereinafter mentioned, on his giving the security hereinafter mentioned, and subject as aforesaid: And inasmuch as the defendant, *John Burhanse*, has lived separate and apart from the said *Maria*, his wife, and by his improper conduct compelled her to leave him, in the year 1792, and has not contributed to her support and maintenance, nor to the support and maintenance of his children by her, since that period; and inasmuch as he has, for upwards of sixteen years past, lived in adultery with another woman, under the assumed character of her husband, knowing his lawful wife, the said *Maria*, to be living: it is thereupon further declared, that the undivided third part of the personal estate of the said intestate, which came to the said *Maria Burhanse*, by descent, in the year 1814, is, under the circumstances of the case, to be adjudged and taken as her separate estate, free from the disposition, control, or debts of her said husband, and that all his assignments and releases thereof, are inoperative and void. And it is ordered, adjudged, and decreed, that it be referred to one of the Masters of this Court residing in the counties of *Albany*, *Columbia*, *Dutchess*, or *New-York*, (unless the solicitors or counsel of the parties shall agree on a Master residing elsewhere,) to take and state an account of the personal estate belonging to *Anthony Dumond*, deceased, and which has come to the hands or possession of his administrators, or either of them, or to the hands or possession of any other person, for their use and behalf, or for the use or behalf of either of them; and that he, also, inquire and report the situation, disposition, use or employment of the said es-



tate, or any part thereof, in the hands of the plaintiff, since the first day of *December*, in the year 1815; and that he have power to examine, upon oath, the plaintiff, or any person not already examined, in respect to the premises, and that he report with all convenient speed. And it is further *ordered*, that the question, whether the plaintiff ought to pay interest on the share belonging to the said *Catharine Harrett*, and the costs of this suit, incurred by the defendants, *Anthony* and *Catharine Harrett*, or either of them, be reserved until the coming in of the report. And it is further *ordered*, that upon the coming in and confirmation of the said report, and after the net amount of the said shares, subject as aforesaid, shall have been established, the plaintiff, on the offer of the security hereinafter mentioned, pay to the said *Anthony Harrett*, the net amount of the share of the said personal estate belonging to his mother, the said *Catharine Harrett*, and that he, also, bring into Court and pay to the register, the net amount of the share of the said personal estate belonging to the said *Maria Burhanse*, and that the register place the same at interest, by investing it in the public funds, or loaning it on adequate real security, as shall hereafter be deemed best, and that the interest thereof, as the same shall from time to time be received, be paid, until further order to the contrary, to the defendant *Maria Burhanse*, for her separate support and maintenance, and that the principal of such share or fund, after her death, be paid over to her two children by the defendant *John Burhanse*, in equal proportions, or to their lawful representatives. And it is further *ordered*, that the question, whether the plaintiff be entitled to the costs of this suit, as respects the defendants, *Samuel Magee*, *Maria Burhanse*, *John Burhanse*, and *Jabez D. Hammond*, out of the said fund or share, belonging to the said *Maria Burhanse*, be reserved, until the coming in of the said report, and that no costs of this suit be allowed to the defendants *Samuel Magee*

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and *John Burhanse*, as against the plaintiff, and that the bill as to them shall stand dismissed without costs; and that the question, whether costs be allowed to the defendant *Hammond*, as against the plaintiff, or the share of the said *Maria*, be reserved. And it is further *ordered*, that the defendant, *Anthony Harrett*, at the time of payment to him by the plaintiff, of the share of his mother, *Catharine Harrett*, give a bond to the plaintiff in double the sum of such share, with two sufficient sureties to be approved of by one of the Masters of this Court, conditioned, that if any debts owing by the said intestate, shall afterwards be recovered or duly made to appear, and which there shall not be other assets to pay, that then the said *Catharine Harrett*, shall refund the share so paid, or such rateable part or proportion thereof, with the other representatives of the intestate, as may be necessary for the payment of the said debts, and the costs and charges duly incurred by reason thereof; and that before the share belonging to the defendant *Maria Burhanse*, be paid into Court, two persons on her behalf, to be approved of as aforesaid, shall give a like bond to the plaintiff."

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V.  
ROCHESTER.

PARKER *against* ROCHESTER and others.

Admitting that the *Utica Insurance Company*, by their charter, have no power, as a *bank*, to discount notes, &c., and that all notes and securities for the payment of money to them, as a *banking* association, are void by the act; (sess. 36. c. 71. 2 *N. R. L.* 234.) Yet a bond, and a judgment confessed thereon, by the makers of a note, discounted by the company, for the *indemnity* and security of the endorser, being *bona fide*, and without a fraudulent intent to evade the law, are valid: and this Court will not, at the instance of a purchaser at a sheriff's sale, under an execution on a subsequent judgment, against the same defendants, interfere to prevent the surety from obtaining payment, under the prior judgment, from the original debtors; especially when the parties to the notes so discounted, raised no objection, and consented to the judgment, and the execution against them, to obtain the money actually advanced.

BILL for an injunction, filed *July 17th, 1810*, and an *Feb. 25th.* injunction allowed. The defendants put in their answer, denying all equity in the bill. The material facts in the bill and answer, will be found in the opinion delivered by the Court.

*H. Bleecker*, for the defendants, now moved to dissolve the injunction. He cited, 1 *Term Rep.* 153. 3 *Johns. Ch. Rep.* 395. *Vin. Abr.* tit. *Usury*, 308. pl. 7. *Str.* 1043. 2 *Johns. Ch. Rep.* 418. 581. 1 *Evans' Poth. on Oblig.* 283. 20 *Vin. Abr.* tit. *Surety*, (D.) pl. 7. (E.) pl. 1, 2. 2 *P. Wms.* 542. 7 *Johns. Rep.* 102.

*J. C. Spencer*, contra, cited 2 *N. R. L.* 234. 15 *Johns. Rep.* 378. *Str.* 1155. *Doug.* 744. 1 *Ld. Raym.* 87. *Cath.* 356. 3 *Johns. Cas.* 66. 212. 12 *Ves.* 371. 3 *Ves.* 373. 1 *Madd. Tr.* 325. 3 *Johns. Ch. Rep.* 467.

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**THE CHANCELLOR.** This is a motion to dissolve the injunction. The defendant, *Rochester*, was the endorser of certain promissory notes, for the payment of money, given to the *Utica Insurance Company*, and he became such endorser as a surety for the house of *Bond & Hatch*, who were makers or endorsers, and interested in the notes. This was on the 1st of *August*, 1817. To indemnify and save him harmless from that responsibility, *B. & H.* gave him a bond of the same date, conditioned for the payment of 7,000 dollars, with a warrant of attorney to confess judgment thereon. The judgment was confessed, for the better security of the defendant *R.*, and docketed on the 5th of *August*, 1817. The notes so endorsed, were received by the *Utica Insurance Company*, in payment of debts previously due, being in effect the renewal of former notes then due; and the manner in which the renewal was made, was the same as that by which regularly incorporated banks usually discount notes. When the notes so endorsed by the defendant *R.*, fell due, they were protested for non-payment, and actions at law were brought against the drawers and endorsers, and judgments obtained in *January* term, 1819. These judgments are stated to have been justly obtained for moneys loaned by the *Utica Insurance Company* to the drawers and endorsers of the notes, and by them expended in their business. After the judgment against the defendant *R.*, he sued out an execution on the judgment so confessed to him, in *August*, 1817. This was done in pursuance of an express understanding between him and *B. & H.*, that when judgment should be obtained against him upon all, or any of the notes, he had endorsed, he might issue execution, and collect the same under the judgment so confessed for his indemnity. This has been done, and *B. & H.*, who are not parties to this suit, have never complained, and we are to presume, are satisfied with the proceeding. The *Utica Insurance Company* have no control over the judgment obtained by the defendant against

*B. & H.*, or over the execution issued under it; but it is the understanding of all the parties to the judgment, and to the loans, that the moneys, when collected under the execution of the defendant *R.*, are to be paid to the *Utica Insurance Company*, towards the judgment so obtained against the defendant *R.*

The charge now is, that the plaintiff, who is a stranger to all these antecedent proceedings, and has no interest in them, having purchased certain lots of *B. & H.*, in the village of *Rochester*, under a junior judgment, of the 30th of *January*, 1818, against *B. & H.*, the defendant *R.* is now about to seize and sell those lots, under his prior judgment of the 5th of *August*, 1817. And what then? What equity has the plaintiff to enable him to come forward and interrupt the prosecution of the prior legal right and title of the defendant *R.*? His ground is, that the notes which were endorsed by the defendant, and given to the *Utica Insurance Company*, were null and void, because, that company were not authorized by their charter to issue bills, discount notes, receive deposits, and carry on other operations as a bank. In *August* term, 1818, the Supreme Court declared, that the company, by such acts, had usurped a franchise, and on an information in the nature of a *quo warranto*, judgment of *ouster* was rendered against them. (*The People v. Utica Insurance Company*, 15 *Johns. Rep.* 358.) If the company were not authorized to exercise these banking powers, then the provision of the act, restraining *unincorporated banking associations*, (*Laws*, vol. 2. p. 234. sess. 36. c. 71.) is supposed to apply, which declares, that "all notes and securities for the payment of money, or the delivery of property, made or given to any such association or company, not authorized, &c., shall be null and void."

Without discussing the question, how far a want of power in the *Utica Insurance Company*, to discount notes in the manner they did, might have been a good defence in a suit on the notes, I apprehend that the plaintiff has no right to

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come here and raise that objection against the judgment confessed upon the bond of indemnity. The parties to the original notes so discounted, were not obliged to raise the objection; and it certainly was not an immoral or unjust act, for the makers and endorsers of those notes to waive the plea of the statute, and consent to judgments against them, to secure the repayment of moneys actually advanced. It is not to be supposed that third persons dealing with a company duly incorporated for certain purposes, and exercising banking powers, under colour of law, and with good credit, could have acted with any fraudulent intent, or with a design to violate the law. There is no ground for any improper imputation, in this case, upon any of the parties to the notes; and if the drawers and endorsers have omitted to plead the statute restraining unincorporated banking companies, there is no good reason why the judgments against them should not be deemed valid and binding. There can be no doubt that the makers and endorsers of the notes, are holden in equity and good conscience, to pay them, for they were given for a fair and valuable consideration. The case is not analagous to that of usury, for there the bargain is corrupt, and made intentionally to evade the law, and to extort unlawful gains; yet it is settled, (*Peterson's case*, *Cro. Eliz.* 104. *Geang v. Swaine*, 1 *Lutw.* 464. *Fisher v. Banks*, *Cro. Eliz.* 25.) that if the defendant misplead the statute of usury, he is held by the plea, and if he omit to plead it, he is bound to pay the debt, even though the usury should appear on the face of the bond. If *A.* becomes surety for *B.* in an usurious bond, and takes a counter bond from *B.* for his indemnity, and he is then sued on the usurious bond, and a recovery had against him, he can prosecute on the counter bond, and a plea by *B.* of usury in the original bond, would be bad, on demurrer. The usury act declaring the original bond, contract, or assurance, void, does not reach the counter bond of indemnity. (*Basset v. Prowe*, 2 *Leon.*

166. *Robinson v. May*, Gro. Eliz. 568. *Gouldsb. Rep.*  
 174. *S. G. Button v. Downham*, Gro. Eliz. 643. *Moore*,  
 398. S. C.) If there be an exception to this rule, it is when  
 the surety was *privity* to the usury, and neglected to plead  
 it in bar to an action on the original note or bond; and this  
 is supposed to be the amount of *Potkin's* case, (3 *Leon.* 63.)  
 and the only distinction by which it can be reconciled to  
 the other cases. The defendant *R.* cannot justly be said to  
 have been privy to an illegal contract, so as to bring him  
 within the equity of this exception. It is very proba-  
 ble, that the parties to the notes were not conscious that they  
 were dealing with a company who had no right to discount,  
 in the character of a bank. The construction of the act in-  
 corporating the *Utica Insurance Company*, was susceptible  
 of much doubt, and of great difference of opinion, and gave  
 rise to profound legal discussions. There is no colour or  
 ground for imputing any conscious wrong, or any undue  
 neglect to the defendant, in omitting to plead the restrain-  
 ing act, in bar of the suit against him as endorser; and the  
 obligors to the bond of indemnity, would not, themselves,  
 be permitted to set up the act in bar of a suit on that bond.  
 The words of the act do not reach his case, or touch his  
 bond, and if he is damnified by being endorser, as he cer-  
 tainly is, by the recovery against him on the note, he has a  
 just right to sue out execution upon his judgment.

The case is much stronger, when we consider that *B.*  
 and *H.* are not in Court interposing the *restraining act*,  
 in bar of a recovery against them. They have confessed  
 judgment, and consent to the execution. It is the plaintiff,  
 who comes in under them, with knowledge of the prior judg-  
 ment of the defendant, who raises the objection; and it ap-  
 pears to me, that there is scarcely sufficient equity on the  
 face of his bill, to support the injunction, and the answers  
 put an end to all pretension to it.

It is alleged in the bill, that the defendant is not damnified;  
 but the answer states a judgment against him as endorser;

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and if that judgment had not been obtained, he would, nevertheless, have been entitled, as surety, to have asked the aid of this Court to compel *B.* and *H.* to pay the debt and release him. (1 *Vern.* 190. 2 *Johns. Ch. Rep.* 561.) Since he has a judgment fairly obtained, and not questioned by the principal debtor, it is impossible for the Court, upon any just principle of equity, to deprive him of the benefit of his judgment and execution. They are, to him, just and lawful means of indemnity, by which he may coerce payment of the debt out of the property of the original debtors.

Motion granted.

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CAMPBELL *against* MESIER and DUNSTAN.

The doctrine of *contribution* is not so much founded on contract, as on the principle of equity and justice, that where the interest is common, the burden, also, should be common; and this principle, that equality of right requires equality of burden, has a more extensive and effectual operation in a Court of equity, than in a Court of law.

Thus, where there was an old party wall between two owners of houses, in the city of *New-York*, and one of them being desirous to build a new house on his lot, pulled down the old house, and with it, the party wall which was ruinous, and rebuilt it with his new house, the owner of the adjoining house and lot, is bound to contribute rateably to the expense of the new wall of partition.

He is not, however, bound to contribute to building the new wall higher than the old; nor, if materials more costly, or of a different nature, are used, is he bound to pay any part of the *extra* expenses. Where one of the defendants dies after the argument of a cause, and before judgment, the decree will be entered, so as to have relation back, as of the day of the final hearing.

THE bill was filed in *April*, 1809. In 1803, the plaintiff and *Peter Mesier*, deceased, were, respectively, owners of



two houses and lots adjoining each other, in the city of *New-York*. The houses were old, and the plaintiff determined to pull down his house, and erect a new one on its scite. There was a party wall, standing equally on each lot, which divided the two houses. The plaintiff employed the city surveyor, and two master masons, to examine the party wall, and to ascertain whether he could safely build a new house, without pulling down the wall; and they certified their opinion, that it would be impossible for the plaintiff to rebuild on his lot, without taking down the party wall, to its foundation, it being decayed and ruinous, and incapable of being partially removed and repaired. The plaintiff delivered this certificate to the defendant *M.*, the son and agent of *P. M.*, then the owner, and requested that his father would unite in the expense of rebuilding the wall. The defendant and *P. M.* refused to accede to the plaintiff's proposal, and forbade him to pull down or injure the wall, for, if he did, he should be made responsible as a trespasser. The plaintiff, notwithstanding, proceeded to pull down his house, and with it the party wall; and he built a new house on his lot, with a new party wall, sixteen inches thick, above the stone foundation, on the scite of the old wall. He, afterwards, applied to the defendant, as son and agent of his father, to have the new party wall surveyed and appraised, and that *P. M.* should pay to the plaintiff, the one half of the appraised value. The bill further stated, that after the plaintiff's house and new party-wall were built, *P. M.* devised his house and lot to his son, the defendant, who, afterwards, sold the lot to the defendant *D.*, and in the deed, expressly conveyed the use of the party-wall, for building, &c., and covenanted to indemnify the defendant *D.*, for so using it. That *D.* pulled down the house so purchased by him of *M.*, and erected a new house on the lot, making use of the party-wall, built by the plaintiff, as the side or end wall of his new house, and made holes in the wall in which the beams were put and fastened. That the house of *D.* is higher than the

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house of the plaintiff. That the plaintiff caused the party-wall to be again surveyed and appraised, and the master masons declared the one half to be worth 353 dollars and 20 cents, which the plaintiff demanded of the defendant *D.*, with half the expenses of the survey, &c. ; which the defendant *D.* refused to pay. That the plaintiff brought an action in the Supreme Court against *D.* to recover the amount; and was nonsuited at the trial, on the ground that he had no remedy at law. The bill *prayed*, that the defendants be decreed to come to a settlement with the plaintiff, touching the building of the party-wall, and to contribute and pay the one half of the value thereof, and half of the expenses of survey and appraisement, with interest; or that the wall be again surveyed and appraised, and the defendants decreed to pay a just compensation to the plaintiff, for the one half, &c.

The defendants answered, admitting most of the facts stated in the bill, but denying that the wall in question was a party-wall, or ruinous, and alleging that the whole was on the lot of *P. M.*, and sufficient for his purpose, &c. They denied that they had any notice of the survey and appraisement, which were made *ex parte*.

Proofs were taken on both sides in the cause; and the evidence supported all the material allegations in the bill.

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The cause was this day brought to a hearing.

*Wells* and *C. Baldwin*, for the plaintiff.

*Slosson*, for the defendants. He cited 5 *Taunt Rep.* 20. 2 *Taunt. Rep.* 62. *Cro. Elis.* 269.

THE CHANCELLOR. From the proof in this case, it is manifest, that the wall in question was a party wall, in which the owners of the two houses and lots had an equal interest. All the witnesses who examined the lots and

houses, and have expressed any opinion on the subject, unite in establishing that fact. Three of the witnesses were master builders, or masons, and skilled in questions and observations of that kind. It is, also, a fact, equally well ascertained, that this party wall, in 1803, when it was taken down by the plaintiff, was in a state of ruin and decay, and dangerous, and utterly incapable of being partially cut down. It was impossible for the plaintiff to rebuild on his lot without taking down that whole party wall to the foundation. The plaintiff had the wall examined in *April*, 1803, by the city surveyor, and a master carpenter and mason, and they united in a certificate, that the wall was unfit to stand, and incapable of being repaired, and that the plaintiff could not build on his lot with safety, without taking it down. This certificate was served upon the defendant *Mesier*, as agent for his father, the then owner, with a proposition from the plaintiff, that the owners should unite in the expense of rebuilding the wall. The answer to this proposition contained a refusal to have the wall taken down, or to unite in the expense of rebuilding it, and forbidding the plaintiff to pull down or injure the wall, under the pain of being responsible as a trespasser. The wall was taken down, and a new wall rebuilt by the plaintiff, on the scite of the old one, with all reasonable care and diligence ; and the question now is, whether the defendant, *Mesier*, as heir and devisee of the original owner, who sold the lot to the other defendant, after the new wall was erected, ought not to be held to contribution for a moiety of the expense.

I have not found any adjudged case in point, but it appears to me, that this case falls within the reason and equity of the doctrine of contribution, which exists in the common law, and is bottomed and fixed on general principles of justice. In *Sir William Harbert's* case, (3 Co. 11.) and in *Bro. Abr. tit. Suite and Contribution*, many cases of contribution are put, and the doctrine rests on the principle, that where the parties stand in *equali jure*, the law requires

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equality, which is equity, and one of them shall not be obliged to bear the burthen in ease of the rest. It is stated in *F. N. B.* 162. b., that the writ of contribution lies where there are tenants in common, or who jointly hold a mill, *pro indiviso*, and take the profits equally, and the mill falls into decay, and one of them will not repair the mill. The form of a writ is given, to compel the other to be contributory to the reparations. In Sir *William Harbert's* case, it was resolved, that "when land was charged by any tie, the charge ought to be equal, and one should not bear all the burden, and the law, on this point, was grounded in great equity." Lord *Coke* illustrates the rule of law requiring equity, and, consequently, contribution, by a case from 11 *Hen. VII.*, and in reference to this most just and reasonable doctrine of contribution, he breaks out into an animated eulogy on the common law, as being, "the perfection of reason, and not according to any private or sudden conceit or opinion." The doctrine of contribution is founded, not on contract, but on the principle, that equality of burden, as to a common right, is equity, and the solidity and necessity of this doctrine, were forcibly and learnedly illustrated by Lord Ch. Baron *Eyre*, in the case of *Dering v. Earl of Winchelsea*, (1 *Cox's Cases*, 318. 2 *Bos. & Pull.* 270. S. C.)

In the case before me, the parties had equality of right and interest in the party wall, and it became absolutely necessary to have it rebuilt. It was for the equal benefit of the owners of both houses, and the plaintiff ought not to be left to bear the whole burthen. The inconvenience of the repair was inevitable, and as small and as temporary as the nature of the case admitted. This is the amount of the proof. The case of the mill, stated in *Fitzherbert*, is analogous, and no reason applies to the one case, but what will equally apply to the other. In *England*, the statute of 14 *Geo. III.* c. 78. has made special and very ample provision on this subject, in respect to houses and partition walls in

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the city of *London* ; but in the absence of statute regulation, we are obliged to call up and apply the principles of the common law. As was observed by Ch. B. *Eyre*, the doctrine of equality operates more effectually in this Court than in a Court of law. There is more difficulty in enforcing contribution at law, and this was felt in the case in *Coke*. There the parties were put to their *audita querela*, or *scire facias*. Contribution depends rather upon a principle of equity, than upon contract. The obligation arises not from agreement, but from the nature of the relation, or *quasi ex contractu* ; and as far as Courts of law have, in modern times, assumed jurisdiction upon this subject, it is, as Lord *Eldon* said, (14 *Ves.* 164.) upon the ground of an implied *assumpsit*. The decision at law, stated in the pleadings, may, therefore, have arisen from the difficulty of deducing a valid contract from the case ; that difficulty does not exist in this Court, because we do not look to a contract, but to the equity of the case, as felt and recognised, according to Lord *Coke*, in every age, by the judges and sages of the law.

*Papinian* (Dig. 17. 2. 52. 10.) states it as a rule of the civil law, that if one part owner of a house in decay, repairs it at his own expense, upon the refusal of the others to unite in the expense, he can compel them to contribute their proportion, with interest, or upon their default, at the end of four months, the house, at his election, becomes his sole property. This unreasonable penalty, or forfeiture, has, in modern times, gone into disuse, but the claim to contribution remains. (*Voet ad Pand. h. t. sect. 13.*)

The rules and doctrines of the *French* law, may be referred to by way of illustration, and to show the prevailing equity and justice of the rule of contribution, in respect to party walls.

A common, or party wall, by that law, is, when it has been built at common expense, or if built by one party, when the other has acquired a common right to it. Every

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wall of separation between two buildings, is *presumed* to be a common or party wall, if the contrary be not shown, and this is not only a rule of positive ordinance, but is a principle of ancient law. (*Code Civil*, No. 653. *Fournel Traite de Voisinage*, edit. 1812. tom. 2. 217. *Pothier's Contract de Société, Première Appendice*, No. 199. 203.) If the common wall be in a state of ruin, and requires to be rebuilt, one party can compel the other, by action, to contribute to the expense of rebuilding it, but the necessity of the reparation must be established by the judgment of men skilled in the business, and made on due previous notice; and if the new wall is made wider or higher, &c. the party building it must bear the *extra* expenses. (*Pothier, ubi sup.* No. 214—222. *Fournel, ubi sup.* p. 236, 237. 239. 242. *Code Civil*, No. 655.)

The customs of *Paris* and of *Orleans*, have special and minute regulations on this subject, and the previous view and judgment of skilful men, and the judicial process in these cases, to ascertain the state of the wall, and to compel contribution, resemble the provisions of the statute of 13 Geo. III. in respect to the city of *London*. Either neighbour may, in certain cases, discharge himself from the duty of contribution, by abandoning entirely his right in the middle wall; (*Fournel*, tom. 1. p. 2. *Civil Code*, No. 656.) and there is another principle in the *French* law, which applies directly against the claim set up on the part of the defendant *Mesier*, to damages for the annoyance of the repairs. "If I, necessarily," says *Pothier*, "deprive my neighbour of the profits of his business arising from the use of his side of the wall, during the time of the repair of the party-wall, I am not bound to indemnify him for his loss, because I am only in the exercise of a lawful right, unless I consume unnecessary time in the reconstruction of the wall."

In the present case, the defendant *M.* had not previous notice of the examination of the wall, in *April*, 1803. It

was altogether *ex parte*. But the defendant, in his answer, put himself upon the denial of the right of the plaintiff, and refused absolutely to unite in a friendly arrangement. The ruinous state of the wall, and the necessity of taking it down, and the character of the wall as a common or party-wall, depended then upon the proof to be exhibited in the cause; and, in all these respects, the plaintiff has supported the charges in his bill, and the defendants have failed in proof to the contrary. But the estimate of the expense furnished by the plaintiff, does not discriminate between the expense of the wall up to the former height, and up to the height to which the new wall was carried by the plaintiff; and on this point a reference may be necessary.

The materials of the new wall were better than those of the former wall, but they were such as are usual, and proper, and beneficial, and they were of the same nature. If the new materials had been of a different and unusual kind, such as marble, for instance, then, undoubtedly, the plaintiff ought to have borne the *extra* expense of the new and rare materials, and this, according to *Pothier*, is the rule in the *French* law.

I am very forcibly struck with the equity of the demand. The houses on each side of the lot were old and almost untenable; and it would be the height of injustice to deny to the plaintiff the right of pulling down such a common wall, and of erecting a new one suitable to the value of the lot, in the most crowded part of a commercial city. It would be equally unjust to oblige him to do it at his exclusive expense, when the lot of the defendant was equally benefitted by the erection, and much enhanced in value. Persons who own lots in the midst of a populous city, must, and ought to submit to the *law of vicinage*, which applies to such cases, and flows from such relations.

I shall, accordingly, declare, that the wall in question was a party-wall: that it was ruinous, and that the plain-

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tiff was in the exercise of a lawful right when he took it down and erected a new one; and that the defendant *M.*, as heir and devisee of his father, *P. M.* (and it is admitted in the answer that for the purpose of this case, he represents his father,) ought to contribute rateably to the expense of the new wall, and that a reference be had to ascertain the amount.

Decree accordingly.

If one of the defendants dies after argument, and before judgment, the decree will have relation back, and be entered as of the day of the final hearing.

N. B. One of the defendants, *Mesier*, having died after the argument, the decree was ordered to have relation back, and to be entered as of the 28th of *November*, last, when the cause was finally heard. This was done under the decision of *Jones v. Le David*, in the Exchequer, in 1791, cited in 2 *Fowler's Excheq. Prac.* p. 169., and which case was cited and adopted by Lord *Eldon*, in *Davies v. Davies*, 9 *Ves.* 461., where the death of one of the defendants in the interval, after the cause had stood some time for judgment, was held not to prevent the judgment. In *Maddock's Tr.* (vol. 2. p. 398.,) a case in MS. of *Ashburnham v. Thompson*, to the same effect, is cited.



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B. WIGHTMAN *against* J. WIGHTMAN.

Though a marriage with a lunatic, is absolutely void ; yet, as well for the sake of the good order of society, as the quiet and relief of the party, its nullity should be declared by the decision of some Court of competent jurisdiction.

And this Court, possessing an exclusive jurisdiction over cases of *lunacy* and *matrimonial causes*, is the proper, and indeed, since there are no *Ecclesiastical Courts* having cognisance of such causes, the only tribunal to afford relief, in such a case, and sustain a suit instituted to pronounce the nullity of the marriage.

Therefore, where a person, insane at the time of her marriage, after her return to a lucid interval, refused to ratify or consummate it, and filed her bill to annul it, this Court decreed the marriage null and void, and the parties absolved from its obligations.

So, where a marriage is unlawful and void, *ab initio*, being contrary to the law of nature, as between persons, ascendants or descendants, in the *lineal* line of consanguinity, or between brothers and sisters, in the *collateral* line, this Court will declare such a marriage, in a suit instituted for that purpose, null and void.

Whether this Court, there being no statute regulating marriages, or defining the prohibited degrees, which render them unlawful, will go further, and declare marriages void between persons in the other degrees of *collateral* consanguinity or affinity ? *Quære*.

THE bill, which was sworn to, stated, that the plaintiff was married to the defendant, on the 5th of *July*, 1814. That, at the time she was married, she was, as she is now informed, and believes, in a state of insanity and mental derangement ; and that she should never have consented to the marriage, if she had been in possession of her reason. That she continued insane, as she has been informed, and believes, and so she charged the fact to be, for six months. That she has never lived, or in any manner cohabited with the defendant, as his wife, and can never consent to ratify the marriage. That she has since remained sole, on account

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of the said supposed marriage; and she cannot, in conscience, contract marriage with any man, until that marriage is legally declared void. The plaintiff prayed, that the marriage between her and the defendant, might be declared null and void.

The *answer* of the defendant, which was sworn to, admitted the marriage, and that the plaintiff was, at the time, in an actual state of insanity and mental derangement, as the defendant discovered immediately after the marriage. That the plaintiff refused to live or cohabit with the defendant, and has ever since refused to do so; and he consented that the marriage should be declared null and void, on account of such insanity of the plaintiff.

*S. Ford*, for the plaintiff, and the defendant, in proper person, after signing his acknowledgment before a Master, for that purpose, submitted the case to the Court, on the bill and answer. The case was ordered to be referred to a Master to examine into the truth of the allegations in the bill, and to report the testimony taken by him, with his opinion thereon.

In pursuance of the order of reference, one of the Masters of this Court reported the proof taken before him; and that the defendant had notice of the time and place of the examination, and was present during part of the time. That from the testimony of several witnesses, among whom were the mother and stepfather of the plaintiff, the Master was of opinion, that all the material allegations in the bill were fully proved and established.

The cause was submitted for a final hearing, on the report of the Master, without argument.

**THE CHANCELLOR.** The fact of insanity of the plaintiff, at the time of the marriage, as charged in the bill, and the fact that the parties have never since lived together, or in any manner cohabited with each other, are proved to my satis-

faction. It follows, as a necessary consequence, from these facts, that the marriage was null and void, from the beginning, by reason of the want of capacity in the plaintiff to contract, and has never since obtained any validity, because the plaintiff has never, since the return of her lucid interval, ratified or consummated it.

It is too plain a proposition to be questioned, that idiots and lunatics are incapable of entering into the matrimonial contract. In *Morrison's* case, before the *Delegates*, (cited in 1 *Bl. Com.* 439. and 1 *Collinson on Lunacy*, 554.) it was held, that the marriage of a lunatic, not being in a lucid interval, was absolutely void. I cite this case, not so much for the rule which it declares, as to show, that though such marriages be, *ipso facto*, void, yet that it is proper that there should be a judicial decision to that effect, by some Court of competent jurisdiction; and that, in *England*, the *Spiritual Court* is the appropriate tribunal. I should presume, that this was all that could have been intended by the common law judges, in *Stiles v. West*, (cited in *Sid.* 112.) where it was said, that if an idiot contract marriage, it was good. In *Ash's* case, (*Prec. in Ch.* 203. 1 *Eq. Cas. Abr.* 278. pl. 6.) the marriage of a lunatic was controverted in the *Spiritual Court*, and the Lord Keeper declared, in that case, that if a party contracted marriage when a lunatic, and agreed to it, and consummated it, in a lucid interval, it would be good. In *Smart v. Taylor*, (9 *Mod.* 98.) before Lord Ch. *Macclesfield*, it was taken for granted, and assumed as a settled proposition, that marriage by an idiot, (and of course by a lunatic) was to be impeached in *Doe's* *Commons*. And in the late case, *ex parte Turing*, (1 *Ves. & Beam.* 140.) it seemed to have been thought necessary, notwithstanding the act of 15 *Geo. II. c. 30.* declaring every marriage of a lunatic void, that there should be a sentence of the Ecclesiastical Court to that effect. This statute could not have been introductory of a new

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rule, for every marriage of a lunatic, must have been void at common law, and by the law of reason ; (*Furor contra-hi matrimonium non sinit, quia consensu opus est. Dig. 23. 2. 16. 2.*) and *Blackstone*, (1 *Com.* 439.) considers it, rather in the light of a declaratory law, and made on account of the difficulty of proving the exact state of the party's mind, at the marriage, and, also, on account of some private family reasons.

The fitness and propriety of a judicial decision, pronouncing the nullity of such a marriage, is very apparent, and is equally conducive to good order and decorum, and to the peace and conscience of the party. The only question, then, is, to what Court does the jurisdiction of such a case belong? There must be a tribunal existing with us competent to investigate such a charge, and to afford the requisite relief; and the power, I apprehend, must reside in this Court, which has not only an exclusive jurisdiction over cases of lunacy, but over matrimonial causes. The Chancery powers, in cases of lunacy, have never been applied to this case, because, there existed in *England*, another and peculiar jurisdiction for the case; but as such a jurisdiction does not exist here, the case seems to belong, incidentally, to the more general jurisdiction of this Court over those subjects. Whatever civil authority existed in the Ecclesiastical Courts, touching this point, exists in this Court, or it exists no where, and all *direct* judicial power over the case is extinguished; but that is hardly to be presumed. For the more full examination of this very interesting point of jurisdiction, let us suppose the abominable case of a marriage between parent and child, or other persons in the lineal or ascending and descending line, is there no Court that can listen to the voice of nature and reason, and sustain a suit *instituted purposely* to declare such a marriage void? If a man marry his mother, or his sister, they are husband and wife, say the old cases, until a divorce, and the marriage be judicially dissolved. (39 *Edw.* III. 31. b.

9 *Hen. VI.* 34. 18 *Hen. VI.* 32. *Bro. tit. Bastardy*, pl. 23. 1 *Roll. Abr.* 340. A. 1. 4. 357. A. 3.) Are the principles of natural law, and of christian duty, to be left heedless<sup>†</sup> and inoperative, because we have no Ecclesiastical Courts recognised by law, as specially charged with the cognisance of such matters? All matrimonial, and other causes of ecclesiastical cognisance, belonged originally to the temporal Courts; (*vide* the case of *Legitimation and Bastardy*, Sir J. Davies' *Rep.* 140. and his argument in the case of *Præmunire*, *ib.* 273.) and when the Spiritual Courts cease, the cognisance of such causes would seem, as of course, to revert back to the *lay* tribunals. I apprehend, then, that the power is necessarily cast upon this Court, which has, by statute, the sole jurisdiction over the marriage contract in certain specified cases. The Legislature has, in that respect, pointed to this Court as the proper organ of such a jurisdiction.

We are placed in a singular situation, in this state, and, probably, one unexampled in the christian world, since we have no statute regulating marriage, or prescribing the solemnities of it, or defining the forbidden degrees. It remains to be settled, not only where the jurisdiction, in some of these cases, resides, but what are the sound and binding principles of common law, under which that jurisdiction is to be exercised.

It was said by *Vaughan*, Ch. J., in *Harrison v. Burwell*, (*Vaug.* 206. 2 *Vent.* 9. S. C.) in delivering the opinion, which he declared to be given upon consultation with all the judges of *England*, that by the ancient common law, some marriages were within forbidden degrees, and unlawful, and that the cognisance of such questions belonged to the Spiritual Courts. But he observed, that if it were not for the statutes of *Hen. VIII.*, (and which we have not re-enacted,) it would be difficult to prove, that they were civilly bound by the *Levitical* degrees, in respect to the lawfulness of marriage connections, unless the prohibition was,

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also, clearly dictated by the natural law. He held, that marriages, in the ascending and descending line, as between parents and children, were monstrous connections, and repugnant to the law of nature, and that, so far, the *Levitical* was a moral, as contradistinguished from a positive, prohibition to the Jews, and binding upon all mankind.

Divorces *a vinculo*, says Lord Coke, (1 *Inst.* 235. a.) are *causa metus*, *causa impotentiae*, *causa affinitatis*, *causa consanguinitatis*, &c. &c. (*Vide* also the case of the Earl of Essex, divorced in the Court of Delegates, and *Bury's case*; 1 *St. Tr.* 815. 10 *St. Tr. App.* 23. *Harg.* edit.) These cases, and that of lunacy, are not within the statute, giving to this Court jurisdiction concerning divorces, for the statute, in respect to divorces *a vinculo matrimonii*, only applies to adultery. All the causes for divorce specified in our statute, are those which arise *subsequent* to the marriage, and suppose it to have been lawful in the beginning. But I presume every one will readily admit, that there are other causes which render the marriage unlawful, *ab initio*, such as lunacy, idiocy, duress, consanguinity, &c.; and the question is, whether we have not a Court which is competent, not merely collaterally, but by a suit instituted *directly*, and for the sole purpose, to pronounce a divorce, in such cases. The principles of canonical jurisprudence, and the rules of the common law, are the same, in respect to some of those strong instances which I have mentioned, and there must be a tribunal to apply them. If it were otherwise, there would be a most deplorable and distressing imperfection in the administration of justice.

Besides the case of lunacy, now before me, I have, hypothetically, mentioned the case of a marriage between persons in the direct lineal line of consanguinity, as clearly unlawful by the law of the land, independent of any church canon, or of any statute prohibition. That such a marriage is criminal and void by the Law of Nature, is a point universally conceded. And, by the Law of Nature, I under-

stand those fit and just rules of conduct which the Creator has prescribed to Man, as a dependent and social being; and which are to be ascertained from the deductions of right reason, though they may be more precisely known, and more explicitly declared by Divine Revelation. There is one other case, in which the marriage would be equally void, *causa consanguinitatis*, and that is the case of brother and sister; and, since it naturally arises, in the consideration of this subject, I will venture to add a few incidental observations. I am aware, that when we leave the lineal line, and come to the relation by blood or affinity in the collateral line, it is not so easy to ascertain the exact point at which the Natural Law has ceased to discountenance the union. Though there may be some difference in the theories of different writers on the Law of Nature, in regard to this subject, yet the general current of authority, and the practice of civilized nations, and certainly, of the whole christian world, have condemned the connection in the second case which has been supposed, as grossly indecent, immoral, and incestuous, and inimical to the purity and happiness of families, and as forbidden by the Law of Nature. (*Grotius de Jure*, &c. lib. 2. c. 5. s. 13. *Puffend. de Jure Gent.* lib. 6. c. 1. s. 34. *Id. de off. Hom.* lib. 2. c. 2. s. 8. *Heinec. Op.* tom. 8. pars 2. p. 203. *Taylor's Elem. Civ. Law*, 326. *Montesq. - Esp. des Loix.* liv. 26. c. 14. *Payley's Moral Philosophy*, b. 3. part 3. c. 5.) We, accordingly, find such connections expressly prohibited in different Codes. (*Dig.* lib. 23. tit. 2. 18. lib. 23. tit. 2. l. 14. s. 2. lib. 45. tit. 1. l. 35. s. 1. *Just. Inst.* lib. 1. tit. 10. *De Nuptiis.* *Vinnius*, h. t. *Heinecc. ubi supra.* *Code Civile de France*, n. 161, 162, 163, 164. *Inst. of Menu*, by Sir William Jones, c. 3. s. 5. *Staunton's Ta-Tsing-Lew-Lee*, s. 107, 108. *Sale's Koran*, c. 4. *Marsden's Sumatra*, p. 194. 221.) And whatever may have been the practice of some ancient nations, originating, as *Montesquieu* observes, in the madness of superstition, the

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objection to such marriages, is, undoubtedly, founded in reason and nature. It grows out of the institution of families, and the rights and duties, habits and affections, flowing from that relation, and which may justly be considered as part of the Law of our Nature, as *rational* and *social* beings. Marriages among such near relations, would not only lead to domestic licentiousness, but by blending in one object, duties and feelings incompatible with each other, would perplex and confound the duties, habits, and affections proceeding from the family state, impair the perception and corrupt the purity of moral taste, and do violence to the moral sentiments of mankind. Indeed, we might infer the sense of mankind, and the dictates of reason and nature, from the language of horror and detestation in which such incestuous connexions have been reprobated and condemned in all ages. (*Plato de Leg.* lib. 8. *Cic. Orat. pro Mil.* 27. *Hermion.* in *Eurip. Androm.* v. 175. *Byblis.* *Ovid. Met.* lib. 9. *Tacit. Ann.* lib. 12. c. 4. *Vell. Paterc. Hist.* lib. 2. ch. 45. *Corn. Nep. Excel. Imp. Prefat.*) The general usage of mankind is sufficient to settle the question, if it were possible to have any doubt on the subject; and it must have proceeded from some strong uniform and natural principle. Prohibitions of the Natural Law are of absolute, uniform, and universal obligation. They become rules of the Common Law, which is founded in the common reason and acknowledged duty of mankind, sanctioned by immemorial usage, and, as such, are clearly binding. To this extent, then, I apprehend it to be within the power and within the duty of this Court, to enforce the prohibition. Such marriages should be declared void, as *contra bonos mores*. But as to the other collateral degrees, beyond brother and sister, I should incline to the intimation of the judges in *Harrison v. Burwell*, already cited, that as we have no statute on the subject, and no train of common law decisions, independent of any statute authority, the *Levitical* degrees are not binding, as a rule of municipal obedience.



Marriages out of the lineal line, and in the collateral line, beyond the degree of brothers and sisters, could not well be declared void, as against the first principles of society. The laws or usages of all the nations to whom I have referred, do, indeed, extend the prohibition to remoter degrees, but this is stepping out of the family circle; and I cannot put the prohibition on any other ground than positive institution. There is a great diversity of usage on this subject. *Neque teneo, neque dicta refello.* The limitation must be left, until the legislature thinks proper to make some provision in the case, to the injunctions of religion, and to the control of manners and opinion.

I have been led further than I, at first, intended, by these remarks, which have been made merely by way of argument, and in illustration of the question touching the power and duty of the Court to declare void the marriage of the lunatic in the case before me. I trust I have shown that there must exist such a power for this and other cases; and I, also, trust that this Court will never be under the painful necessity of making a more solemn and direct application of the doctrine.

I shall, accordingly, declare the marriage null and void, and that the parties are free from the obligations of marriage with each other.

Decree accordingly.

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**Le Roy and others against THE MAYOR, ALDERMEN, AND  
COMMONALTY of the City of New-York.**

This Court, has no power to interfere with, or to set aside an *assessment* on the proprietors and occupants of lots, to defray the expense of a *common sewer*, made by commissioners, under the direction of the Mayor, Aldermen, and Commonalty of the city of *New-York*, pursuant to an act of the Legislature, for that purpose, on the ground merely of a mistake in judgment of the commissioners of estimate and assessment, in not including *all* the owners or occupants intended to be benefitted by the sewer; there being no allegation of bad faith or partiality in the commissioners, in making the assessment, which, after being ratified by the *Common Council*, is declared, by the act, to be final and conclusive.

The only remedy, if any, for the party aggrieved, is at law.

Feb. 16th. and  
March 1st.

THE plaintiffs filed their bill for relief against an assessment made to defray the expense of a common sewer, in the city of *New-York*, and for an injunction to restrain the defendants from collecting the assessment, or taking any measures for that purpose.

The material facts stated in the bill will be found in the opinion delivered by the Court.

Feb. 16th.

*S. Jones*, jun. for the plaintiffs, after reading the bill, moved for an injunction.

*Edwards* and *H. Bleecker*, contra.

The Chancellor took the bill for consideration.

March 1st.

THE CHANCELLOR. The object of the bill is, to be relieved against an assessment made under the direction of the corporation of the city of *New-York*, to defray the expense of a large common sewer, in *Canal-street*, in the said

city. The assessment was directed and made under the provision contained in the 175th section of the act of the legislature, passed the 9th of April, 1813, entitled, "an act to reduce several laws relating particularly to the city of New-York, into one act."

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By the provisions of the act, it is declared to be lawful for the corporation to cause, among other improvements, "common sewers to be made in any part of the city, and to cause estimates of the expense to be made, and a just and equitable assessment thereof, among the owners or occupants of all the houses and lots intended to be benefitted thereby, in proportion, as nearly as possible, to the advantage which each shall be deemed to acquire, and to appoint skilful and competent disinterested persons to make every such estimate and assessment; and those persons shall take an oath to make the same fairly and impartially, and having made such estimate and assessment, shall certify the same to the common council, and being ratified by it, shall be binding and conclusive upon the owners and occupants of such lots, so to be assessed." The bill states, that all these provisions of the act have been complied with, except, that the assessment has not embraced a sufficiently extensive district of the city, to include all the owners and occupiers of lots intended to be benefitted by the sewer. It is contended by the bill, that the owners and occupiers of all the lots from whence, by the permanent regulations of the corporation, the waste water is carried off into *Canal-street*, are, and were intended originally to be benefitted by the sewer, and that they ought to bear a rateable proportion of its expense. There may be an error of judgment upon this point, both in the persons who made the estimate and assessment, and in the common council who heard the objections of the plaintiffs, and yet ratified the assessment; but the greater difficulty with me is as to the question of jurisdiction. I cannot find that the Court interferes in cases of this kind, where the act com-

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plained of was done fairly and impartially, according to the best judgment and discretion of the assessors; and a precedent once set, would become very embarrassing and extensive in its consequences. If the power under this statute had been exercised in bad faith, and against conscience, I might have attempted to control it; but a mere mistake of judgment in a case depending so much upon sound discretion, cannot properly be brought into review, under the ordinary powers of this Court. There must have been a thousand occasions and opportunities for the exercise of such an appellate jurisdiction, in the history of the jurisprudence and practice of the *English* Court of Chancery, if such a jurisdiction existed, and yet we find no precedents to direct us. A mistake of judgment in the assessors, upon the matter of fact, what portion or district of the city was intended to be, and actually was, benefitted by the common sewer, can hardly be brought within the reach of that head of equity jurisdiction which relates to breaches of trust. Here is not, strictly speaking, a violation of duty. No bad faith or partiality in the assessors is pretended. The aid of this Court might as well be asked to review every assessment of a land tax, or a poor rate. I apprehend, it would require a special provision by statute to authorize Chancery to interfere with these assessments. Instances are numerous in the *English* law, in which jurisdiction is given to the Chancellor, under local or private acts; and the cases imply that a statute was requisite to give the jurisdiction.

Let us examine the case *ex parte Coxall*, (3 *Atk.* 639.) which concerned the *city of London tithes*, and it will afford some instruction, as to the extent of equity powers. The statute of 22 and 23 *Charles II.* directed that certain persons in each ward and parish, should assemble in each parish, and should "proportionally assess upon all houses, shops, warehouses, and cellars, &c. the whole respective sum by the act appointed, in the most equal way, that the said assessors, according to the best of their judgment, could

make it." The act further provided, that if any difference should arise in the assessment, and a parishioner should find himself aggrieved by the assessment, an appeal lay to the Lord Mayor, and Court of Aldermen, who were to summon all parties concerned, and hear and determine the same, in a summary way, and the judgment by them given was to be "final and without appeal." After the assessment was made and settled, the Lord Mayor, upon refusal of any of the inhabitants to pay their assessments, was to issue his warrant of distress. The act further provided, that if the Lord Mayor or Court of Aldermen should refuse to perform any of the duties required of them, the same should be performed by the Lord Chancellor with two of the Barons of the Exchequer. Upon this act, Lord *Hardwicke* observed, that the authority of the great seal *did not extend to every case under the act, but only where there had been a refusal, by the Lord Mayor, &c., to execute the powers*; and he, also, observed, that in case of any variance or difference between the minister and the parishioners, as to the assessment, *the Court of Chancery had no jurisdiction, unless the Lord Mayor refused to take cognizance.*

Lord *Hardwicke's* opinion equally applies to the case before me. If Chancery had no jurisdiction, when an assessment had not been *proportionably made, in the most equal way*, as the *English* statute directed, and if the only relief was in the review of the Lord Mayor and Court of Aldermen, whose decision was declared to be "final and without appeal;" we are equally required to say that Chancery has no jurisdiction here, for an unequal assessment, because the Mayor, Aldermen, and Commonalty, in Common Council convened, are here, also, to ratify the assessment, which includes a review of it, and a power to correct it, if not duly and justly made; and their decision is declared to be "binding and conclusive."

In the case of *The Attorney General v. The Foundling Hospital*, (4 Bro. 165.) a bill was filed, and an injunction

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asked, to restrain the defendants from building on estates belonging to the hospital. Lord Commissioner Dyre observed, that where trustees or governors abused their trust, the Court could take notice of it, but where the management of a charity was entrusted to governors or guardians, by statute, they had a right to exercise their discretion, and though the Court should be of a different opinion, it would not set up that opinion against the discretion of the trustees. The other two Commissioners concurred, and the motion for an injunction was denied. The same principle was admitted and supported in *Haight v. Day*. (1 Johns. Ch. Rep. 18.) It may be said, that the assessors in this case had no discretion, but were bound to make the assessment in just proportions among all the owners and occupants benefited by the sewer. The discretion in these cases, means the exercise of sound judgment according to equity—*discretio est scire per legem quid sit justum*; the assessors certainly had that discretion, in determining the extent and value of the benefit, and their case comes within the influence and principle of those decisions.

If the plaintiffs are truly aggrieved, their remedy, if any they have, must be in the Supreme Court, by *certiorari*. In *Wildy v. Washburn*, (16 Johns. Rep. 50.) the Supreme Court say, that whenever the rights of an individual are infringed by the acts of persons clothed with authority to act, and who exercise that jurisdiction illegally, and to the injury of an individual, the person injured may have redress by *certiorari*. The same general jurisdiction of that Court has been asserted and declared in other cases; (*Kinderhook v. Claw*, 15 Johns. Rep. 538. *Lawton v. Cambridge*, 2 Caines' Rep. 179.) and seems to be supported by the powers acknowledged to belong to the Court of K. B. A *certiorari* lies (1 Salk. 145. *Anon.* Holt, Ch. J., in 1 *Ld. Raym.* 469.) to that Court, to correct a mistake made by commissioners of sewers; and though the K. B., in *The King v. King and others*, (2 Term Rep. 234.) refused that

writes to remove the assessment of the land tax, they placed the refusal on the ground of the great public inconvenience of the step; and for the same reason they have refused it in the case of a poor rate. But it does not belong to me, to point out or vindicate the remedy at law. It is sufficient, upon the present motion, to say, that the remedy, if any, is at law, and that it does not fall within the ordinary jurisdiction of this Court.

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Motion denied.

GOUVERNEUR and others against L. ELMENDORF, impleaded with others.

A cross bill must be filed before publication passed in the original cause.

It is not a matter of course to stay proceedings, or enlarge publication, in the original cause, until an answer is put in to a cross bill filed after proceeding, or answer, in the original cause; but it depends on special circumstances.

When there has been very great delay and negligence on the part of the defendant, he will not be allowed to file a cross bill, nor amend his answer, nor to file a supplemental answer, nor to issue a commission, so as to delay the plaintiff.

THE plaintiffs filed a bill, in 1810, to foreclose a mortgage executed by the defendant to them.

March 1st.

The defendant put in his answer, on the 12th of November, 1810, in which he admitted the execution and forfeiture of the mortgage, and that he had paid only 360 dollars towards interest, in the spring of 1805. He stated, that the consideration of the mortgage was a deed from the plaintiffs to him, of the date of the 13th of May, 1804, in which, as executors of Nicholas Gouverneur, deceased, they conveyed to him, for the consideration of 8,000 dollars, "land office treasury warrants of Virginia, dated 15th of October, 1779, for

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*lands, &c.*, and that they were issued in the name of *Samuel Beall*, who placed them in the hands of *John May*, to be located and surveyed for *Robert S. Biends*, and they were sold, subject to the reservations contained in the warrants, &c., and subject to the claims of *John May*, and *Humphrey Marshall*, by reason of agencies, in respect to the same, so as such claims did not exceed, in quantity or value, one fourth of the lands. The grantors in the deed agreed, for the heirs of their testator, that the defendant might hold and possess the premises, without the interruption or denial of the said *Biends*, or his heirs, and that the heirs of *N. G.* would warrant the land against the heirs and assigns of *Samuel Beall*, and *Robert S. Biends*." This was the substance of the deed referred to in the answer. The defendant further stated, that he paid 3,000 dollars when he took the deed, and gave a bond, and the mortgage in question, for the residue; that he went to *Kentucky*, in 1803, after the contract was made, and discovered that the land warrants had been, in part, located on 10,812 acres, and that the legal estate was in the heirs of *J. and N. Gouverneur*, and that the residue of the land warrants were located on lands of which the legal estate was in the heirs of *Samuel Beall*, and the heirs of the testator had only an equitable interest, if any. That all the lands, aforesaid, were adversely possessed, and entangled with interfering claims and locations. In this answer, the defendant prayed for two years, at least, to discharge the mortgage, on paying the interest annually.

In an affidavit made by the defendant, on the 1st of *May*, 1811, and presented to the Court, he stated, that the lands so conveyed to him, amounted to 19,350 acres, and that he had applied to this Court for a commission to examine witnesses in *Kentucky*, and failed in his motion, because no notice of it was given to the opposite solicitor. That such a commission was necessary for him, to show, that the plaintiffs were not seised of such an interest as they undertook to



convey in the lands, inasmuch as they owned only a moiety of the 10,512 acres, and the legal estate in the residue, or 8,500 acres, was in the heirs of *Beall*.

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That from this time the plaintiffs rested in the suit, from indulgence to the defendant, until 1818, when they gave him notice that they should proceed.

A decree was taken by default, in *September*, 1818, and a reference made. In *November*, 1818, an order of sale was entered. The defendant drew a cross bill in the autumn of 1818, but never filed it; and on the 3d of *November*, 1818, he went to *Kentucky*, and was absent for a year.

On an application of the defendant's solicitor, on the 9th of *December*, 1811, to set aside the rule for publication, of *September* preceding, and the subsequent proceedings, the proceedings were stayed, and leave given to the defendant to apply, for the purposes aforesaid, at *January* term, 1819. No application was made, nor any further step taken on the part of the defendant.

On the 17th of *September*, 1818, the plaintiff voluntarily vacated the order of *September*, 1818, for passing publication, and entered another rule, that the defendant show cause, in three weeks, why publication should not pass. On the 4th of *October*, 1819, on application on behalf of the defendant, the time for publication was enlarged to the 22d of *November*, 1819, and on the 23d of *November*, the rule for publication passed, and the cause was noticed for final hearing in *January* term, 1820.

The above is a brief account of the proceedings in the cause. The affidavits of two of the plaintiffs, and of the solicitor for the plaintiffs, went to deny several of the allegations of merits, and of excuse for the delay set up on the part of the defendant. A letter, also, from the defendant, to one of the plaintiffs, dated *January* 3d, 1807, was produced, in which the defendant speaks "of the claims which he has been so unfortunate as to take from off the shoulders of the plaintiffs. That he meant to have paid

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before, and had done his utmost, but had not been able to raise the money. That he had not as yet realized a cent of property from the claims, and nothing to assure him of better prospects, so that out of that fund he had nothing. That he had heavy law suits to carry on during the preceding summer, the expense of which had prevented him from doing any thing effectually with the plaintiffs. That the law suits had all been settled, and he expected reimbursements that winter, out of which he would pay as much as possible. That he hoped the plaintiffs would be content with receiving interest, until he could effect a sale of some real property. That he had already made one journey to *Kentucky*, and thought it would not be much of a favour for the executors to wait for the principal of their demand, until he was able to dispose of property, to discharge it."

The defendant gave notice of a motion for *January term*, 1820, founded upon his *petition*, detailing the proceedings in the cause, for a rule to set aside all the proceedings subsequent to the joining of issue in the cause; and, also, for leave to amend his answer, or to file a cross bill against the plaintiffs and others; and that the proceedings on the part of the plaintiffs be stayed, until such cross bill shall have been answered.

*The Defendant, in propria persona*, in support of the motion.

*W. A. Duer*, for the plaintiffs.

THE CHANCELLOR. The defendant is clearly too late to stay the proceedings by a cross bill. A cross bill must be filed *before* publication is passed in the original cause. This has been understood and declared to be the invariable rule on the subject of a cross bill. (*Sterry v. Arden*, 1 *Johns. Ch. Rep.* 62.) The practice, as stated by Lord *Hardwicke*, was not to stay proceedings, but only to stay or

enlarge *publication* in the first cause, until the answer to the cross bill came in; and he said it was never of course, but depended upon special circumstances, whether publication should be enlarged on filing a cross bill, if filed *after the original cause was proceeded in*. (1 *Atk.* 21. 291. 2 *Ves.* 336.) It is, therefore, most manifest that the cross bill must be filed *before* publication in the original cause. In *Cook v. Broomhead*, (16 *Ves.* 133.) a cross bill was filed *after* the rules for passing publication had issued in the original cause, and a motion that publication in the original cause, be enlarged, until a fortnight after answer to the cross bill, was refused, with costs, as being against the practice. A motion to enlarge publication, until answer to a cross bill, filed after the answer to the original bill, was, also, denied in *Dalton v. Carr*, (16 *Ves.* 93.)

This case presents a series of acts of indulgence on the part of the plaintiffs, and of gross and obstinate delays on the part of the defendant, that are extremely rare; and to allow the cause to be delayed any longer, by a commission, or by a cross bill, would be doing great injustice to the suitor, and a very serious injury to the practice of the Court. The defendant knew that a commission was wanted, in 1811, for he had then already applied for one. He had then visited *Kentucky*, and discovered all the difficulties and embarrassments attending the title under the land warrants, which he had purchased. Why was not this commission sued out in due season? The plaintiffs, and their solicitor, deny every charge that the delay was justly imputable to them. And it is worthy of notice, that though the defendant, as he admits in his answer, went to the state of *Kentucky*, in 1803, and discovered the impediments of which he complains; yet in his last letter of 1807, he sets up no such excuse for non-payment of the mortgage debt. Unfortunate as he states his speculation to have been, he, nevertheless, seems to admit his obligation to pay, and promises to use his efforts to do it.

1820.

GOUVERNEUR  
V.  
ELZENDORF.

There is no just pretence to question the regularity of the proceedings, on the part of the plaintiffs, or to stay the suit until the defendant can sue out and execute a commission in *Kentucky*, or file a cross bill, and compel answers to it. He has lost the opportunity to annex such a condition to either of those measures, by his inexcusable *laches*. The most that can be granted is to allow a commission to go at the peril of the defendant, and without delay to the plaintiffs. Nor is there any sufficient ground disclosed for allowing the answer to be amended, or, according to the more modern practice, of granting leave to file a supplemental answer. There ought to have been an extremely clear and strong case made out, after what has passed in this cause, showing the mistake in the answer, and the new and material discoveries since. There is no such ground laid for the allowance of so delicate and dangerous an indulgence. The answer was filed many years after a journey to *Kentucky*, and when all the facts alleged by way of defence, might, with due diligence, have been sufficiently known.

I shall, accordingly, declare, that *inasmuch* as the answer was filed in *November*, 1810, and no specific or material mistake therein is shown or alleged; and *inasmuch* as by the defendant's affidavit of the 1st of *May*, 1811, he speaks of an application already then made for the examination of witnesses in *Kentucky*, and stated, that a commission was necessary to take proof, to show that the testator of the plaintiffs had no interest in the lands which they undertook to convey; and *inasmuch* as the rules for publication passed in *September*, 1818, and were voluntarily relinquished by the plaintiffs in *September*, 1819; and *inasmuch* as publication again passed on the 23d day of *November*, 1819, after the same had been enlarged for several weeks, at the instance of the defendant; and *inasmuch* as the plaintiffs have prosecuted this cause, since the filing of the bill, with forbearance and indulgence, and the defendant has been guilty of negligence, without excuse, in not filing a cross bill, and

is not suing out a commission during this long period of time, and to delay the cause further in its present state, for either of these objects would be unreasonable, and contrary to the rules and practice of the Court, and injurious to the credit of the administration of justice; therefore, the motion to set aside or stay proceedings, or to amend the answer, is denied, with costs; but the defendant may sue out a commission, on the usual terms, at his peril, and upon condition that the cause is not to be delayed thereby.

1820.  
THORN  
v.  
GERMAND.

Order accordingly.

THORN and another *against* GERMAND.

Before the plaintiff, *after* replication, will be allowed to amend his bill, he must obtain leave to withdraw his replication; and the materiality of the amendment, and the reason why it was not stated before, must be satisfactorily shown to the Court.

But if a witness has been examined, the pleadings cannot be altered or amended, unless under very special circumstances, or in consequence of some subsequent event, except merely for the purpose of adding parties.

The proper course, when the plaintiff cannot amend his bill, is to apply for leave to file a supplemental bill.

MOTION to amend the bill, by adding new and material charges, after issue joined, a rule to produce witnesses, a commission to take testimony sued out, and one witness examined. The petition stated, that after issue joined, and while the solicitor for the plaintiffs was preparing to take testimony, the matter proposed to be introduced by way of amendment, was discovered. The affidavit, as to the above facts, was sworn to by the solicitor for the plaintiffs.

March 2d.

1820.

THORN  
V.  
GERMAND.

To oppose the motion, an affidavit of *G. B.*, a third person, was produced, stating, that before the filing of the bill, he communicated to one of the plaintiffs, the material fact proposed by way of amendment, viz. the entry of a judgment in the Supreme Court.

*J. Tallmadge, jun.* for the motion.

*P. Ruggles, contra.*

THE CHANCELLOR. The application should have been for leave to withdraw the replication, for the purpose of amending the bill. No amendment can be allowed, going to the merits, while the replication remains. (1 *Atk.* 51. 1 *Ves. jun.* 142. *Newland's Pr.* 82.) And if that had been the motion, the materiality of the amendment, and why the matter was not stated before, must have been shown, and satisfactorily explained. (*Brown v. Ricketts*, 2 *Johns. Ch. Rep.* 425. *Turner v. Chalwin*, cited in 1 *Fowler's Ex. Pr.* 113.)

In this case, it is proved, on the part of the defendants, and it is not denied by the plaintiffs, that they, or one of them, knew the existence of the matter now sought to be introduced into their bill, before the filing of the bill. It is, therefore, not new matter, that is to be added by way of amendment, but matter before resting in the knowledge of the party.

There is another fatal objection to the motion. Here has been a witness already examined in the cause. If no witness had been examined, an amendment, otherwise proper, and when the omission was duly accounted for, might have been permitted, for it has been permitted after publication. (*Hastings v. Gregory*, cited in *Mif. Pl.* 258. and 1 *Fowler's Ex. Pr.* 111.) But after the examination of witnesses, the pleadings cannot be altered or amended, except under very special circumstances, or in consequence of

some subsequent event, unless it be for the sole purpose of adding parties. This is the established rule of practice on the subject. (*Mif. Pl.* 258, 259.) The only course for the plaintiff, in these cases, when he cannot have permission to alter his original bill by amendment, is to apply for leave to file a supplemental bill. (*Shephard v. Merrill*, 3 *Johns. Ch. Rep.* 423.)

1820.

LIVINGSTON  
v.  
WOOLSEY.

Motion denied with costs.


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LIVINGSTON AND THOMPSON, *Assignees, &c. against*  
WOOLSEY.

Where, on the service of the *subpoena*, the defendant's solicitor wrote a letter to the solicitor of the plaintiffs, requesting him to cause the appearance of the defendant to be entered, and to send him a copy of the bill; and the plaintiffs' solicitor sent a copy of the bill accordingly, but neglected to enter the defendant's appearance, and proceeded to have the bill taken *pro confesso*, and a final decree entered in the cause: *Held*, that the sending a copy of the bill, and requesting that an answer might be put in, was to be deemed an admission of an appearance, or a waiver of the formal entry of it, and that the defendant was, therefore, to be considered as in Court, and entitled to be served with a rule to put in an answer, before the bill could be taken *pro confesso*; and the order for taking the bill *pro confesso*, and all subsequent proceedings, were set aside, for irregularity.

MOTION to set aside a decree by default, and subsequent proceedings, as irregular; 1. Because, the defendant's solicitor was not ruled to answer, before the entry of the rule taking the bill *pro confesso*; 2. Because, the defendant died immediately after the entry of the final decree, and before the Master received the decretal order to sell the mortgaged premises.

March 3d.

1829.  
  
 LUMMINGTON  
 v.  
 WOOLAST.

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It appeared, that upon service of the *subpoena*, the solicitor for the plaintiff was requested, by letter, on behalf of the solicitor of the defendant, to enter the appearance of the defendant, and to enclose to him a copy of the bill; that the solicitor for the defendant, soon after, received by letter a copy of the bill, with a request, that an answer might be put in as soon as convenient; that the solicitor for the defendant relying upon this correspondence, presumed the appearance of the defendant had been duly entered, and not being ruled to answer, was prevented, by the removal of the defendant's family, and by his sickness, from putting in an answer until after the bill had been taken *pro confesso*, and within a few days prior to the time that a final decree was entered, by default. No actual appearance was entered until the answer was filed. After the entry of the final decree, the defendant died, and the solicitor for the plaintiffs proceeded, notwithstanding, to cause the mortgaged premises, which the bill was filed to foreclose, to be advertised and sold, and they were purchased in by the solicitor for the plaintiffs. The knowledge of these latter proceedings, did not come to the heirs of the defendant, until after the sale.

The answer of the defendant went to deny, wholly, the equity of the bill; and the above facts were not contradicted, except that the solicitor for the plaintiffs denied any request or suggestion to him, to enter the defendant's appearance, and denied the truth of the matter set up as a defence in the answer.

*S. A. Foote*, for the motion.

*G. L. Thompson*, contra.

THE CHANCELLOR. The fact, that a copy of the bill was enclosed by letter to the solicitor of the defendant, and an answer to the bill requested, is an admission of the



appearance of the defendant, or, at least, a waiver of the formal entry of it with the clerk, and, consequently, the defendant was to be deemed *rectus in curia*, and entitled to be ruled to put in an answer, before the bill was taken *pro confesso*, against him. The subsequent proceedings, on the part of the plaintiffs, were, therefore, irregular. As Lord Hardwicke observed, in *Floyd v. Nangle*, (3 Atk. 568.) "If there is an irregularity in the proceedings of the plaintiff, and the plaintiff insists upon the strict default of the defendant, as the Courts of law say, it is very necessary a person insisting upon the rigor, *should hit the bird in the eye.*" But if this irregularity did not exist, it would follow, that the proceeding in *July* last, to advertise the land for sale, and the sale in *September*, and the confirmation of the report in *October*, were all irregular, because the defendant died in *June*, and the suit had not been revived against his children and heirs.

The motion is, accordingly, granted, so far as to set aside the order taking the bill *pro confesso*, and all the subsequent proceedings; and the answer is to be deemed duly put in at the time it was filed. No costs of the proceedings set aside, or of this motion, are allowed to either party, as against the other.

Motion granted.

1820.

LIVINGSTON

v.

WOOLLEY.

1820.

BERGER

v.

DUFF.

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BERGER AND ICARD, *Executors of ICARD, against DUFF.*

Where a power is given to *executors* to sell the estate, or certain parts of it, it is a personal trust and confidence, and they cannot sell by attorney.

Thus, where *A.* authorized his executors, *B.* and *C.*, to sell certain lots of land, if, under the circumstances of the times, they should deem it prudent; and *C.* having gone abroad, sent a power of attorney to *B.*, his co-executor, to sell the land, on such terms as he should deem expedient: *Held*, that an agreement for the sale, entered into by *B.*, for himself and *C.*, was not valid, and a bill filed for a specific performance of it, was, accordingly, dismissed.

March 9th.

THE bill stated, that *Joseph Icard*, by will, authorized the plaintiffs, as his executors, and the survivor of them, to sell two lots of land in the city of *New-York*, if imperious circumstances of the times, or the extreme hazard of depreciation in value of that property, should, in the best judgment of the plaintiffs, render it prudent to sell the same. That after the death of the testator, the plaintiffs assumed the trust as executors, and the plaintiff, *Icard*, went to *France*, where he resided when the bill was filed. That on the 10th of *October*, 1818, at *Paris*, he, by power of attorney duly executed, authorized the other plaintiff, as his co-executor, to sell the said lots of land, upon such terms and conditions as he should deem expedient. The bill stated the great depreciation and daily diminishing value of the property, and that it was best to sell it, and that the plaintiffs agreed to sell to the defendant one of the lots, being No. 308 *Broadway*, with the buildings thereon, for 15,500 dollars, and that the defendant now refused to accept a deed, or to pay, &c. *Prayer* for a specific performance of the agreement.

The defendant, in his answer, admitted all the material

facts; but stated, that the agreement was made with the plaintiff *Berger*, and with the understanding, that the plaintiffs were to give a good title; and he insisted, that the plaintiff *Icard*, who is in *France*, cannot, by letter of attorney, authorize the plaintiff *Berger*, to execute the deed, and that the sale ought to be made by both of the executors in person, and not by attorney; and he submitted to the Court, whether a valid deed can be given, which, however, he was ready to accept.

The case was submitted upon the pleadings, and on the points raised out of them.

*J. T. Irving*, for the plaintiffs.

*D. S. Jones*, contra.

THE CHANCELLOR. The executors cannot sell by attorney. The power given to them, by the will, was a personal trust and confidence, to be exercised by them jointly, according to their best judgment, under the circumstances contemplated by the will. One executor in this case cannot commit his judgment and discretion to the other, any more than to a stranger; for, *delegatus non potest delegari*. The testator intended, that his representatives should have the benefit of the judgment of each of the executors applied to the given case, so long as both of them were alive. The agreement to sell was not valid, being made by one executor, without the personal assent and act of the other. The power was not capable of transmission or delegation from one executor to the other, and the rule of law and equity, on this point, is perfectly well settled. (9 Co. 75. *Comb's case*. *Ingram v. Ingram*, 2 Atk. 88. Sir Thomas Clarke, in *Alexander v. Alexander*, 2 Ves. 643. Lord Hardwicke, in *Attorney General v. Scott*, 1 Ves. 417. Lord Redesdale, in 2 Sch. & Lef. 330. *Hawkins v. Kemp*, 3 East, 410. *Sugden on Powers*, (2d edit.) 167.)

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 v.  
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The agreement was not, therefore, a due execution of the power under the will, and the bill must be dismissed without costs.

Bill dismissed.

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THE SILVER LAKE BANK, (in *Pennsylvania*,) against  
 G. NORTH.

A foreign corporation, or incorporated bank of another state, may sue in their corporate name, and may file a bill for the sale of land in this state, under a mortgage taken to secure money lent.

If the loan and the mortgage were concurrent acts, it is within the reason and spirit of the act of incorporation, by which the plaintiffs are authorized to take mortgages, &c., for the security of debts previously contracted.

But it seems, that this Court would not, in this collateral way, decide a question of *misuser*, by setting aside a *bona fide* contract.

If an incorporated bank of another state lends money, and takes a mortgage in this state, it is not a violation of the act of the Legislature of this state, passed *April 21, 1818*, relative to banks, &c., for restraining unincorporated associations from carrying on *banking* business.

Where a mortgagee was compelled, for his own security, to satisfy an execution on a prior judgment, in favour of another, he was held, by right of substitution, to stand in the place of the judgment creditor, and entitled, on a sale of the mortgaged premises, to receive out of the fund the amount of the judgment, as well as the mortgage debt.

*March 18th.* THE bill stated, that on the 10th of *November, 1817*, the defendant mortgaged to the plaintiffs lands in the county of *Delaware*, in this state, to secure the payment of a bond of the defendant and *B. North*, to them, for 3,000 dollars, which was given to secure such sums of money as should be thereafter lent by the plaintiffs to the obli-

gors, or either of them. That on the 13th of *November*, 1817, the plaintiffs lent to *B. N.* 2,000 dollars, on this security, and on the 19th of *March*, 1818, the further sum of 525 dollars. That a judgment had been obtained by the *Catskill* bank, in this state, against the defendant, in *October*, 1817, for 1,083 dollars and 3 cents, on which the defendant and *B. N.* had assured the plaintiffs there was only the sum of 400 dollars due. That this judgment had been assigned to *M.* and *P.* with whom the defendant and *B. N.* had combined to procure a sale, on execution, under the judgment, so as to defeat the plaintiff's security; and the plaintiffs were, therefore, compelled to pay to the sheriff, the amount of the debt and costs on the execution, being 1,129 dollars and 92 cents. *Prayer*, that this sum, with the interest thereon, might be added to the sum due on the bond and mortgage, and that the plaintiffs might retain, on the sale of the mortgaged premises, the amount so paid on the judgment, together with the mortgage debt, and costs; and that the mortgaged premises might be sold, and the equity of redemption foreclosed, &c.

The *answer* of the defendant admitted the material facts charged, and set up several grounds of defence: 1. That the plaintiffs, being a corporation, created in the state of *Pennsylvania*, by virtue of an act of the Legislature of that state, passed *March* 21, 1804, which was set forth, this Court will not recognise their capacity to sue here as a banking corporation. 2. That by the act of their incorporation, the plaintiffs were not authorized to take a mortgage, except to secure a debt previously contracted, in the course of its dealings; and here the money was lent after the bond and mortgage were executed. 3. That the mortgage was a fraud upon the act of this state to *restrain* unincorporated banking associations.

The cause came on to be heard on the pleadings and proofs.

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1820. *Sudam*, for the plaintiffs. He cited 1 *Johns. Cas.* 132.  
 8 *Johns. Rep.* 378. 16 *Johns. Rep.* 43.

SILVER LAKE  
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*Van Vechten* and *Sherwood*, for the defendant. They  
 cited 1 *Johns. Rep.* 432. 3 *Term Rep.* 454. 4 *Term Rep.*  
 466. 1 *Bac. Abr.* 559. tit. *Corporation*. 4 *Inst.* 20. 1  
*Black. Com.* 43. 2 *H. Bl.* 410. 1 *Bay's South Carolina*  
*Rep.* 46. *Kaims' Law Tracts*, 312. 354. 2 *Cranch*, 168.  
 2 *Johns. Rep.* 114. 1 *Cranch*, 259. 3 *Cranch*, 323. 1  
*Ld. Raym.* 562. 2 *Johns. Cas.* 324. 16 *Johns. Rep.* 7.  
*Sanders on Uses*, 63.

THE CHANCELLOR. There are several objections raised  
 by the answer, and by the counsel, at the hearing, to the  
 right of the plaintiffs to a foreclosure or sale of the mort-  
 gaged premises.

1. It is objected, that a foreign corporation cannot be re-  
 cognised as such, and entitled to sue in our Courts.

A foreign cor-  
 poration may  
 sue in its cor-  
 porate name,  
 in this Court,  
 as well as in a  
 Court of law.

It appears, by the pleadings and proofs, that the plaintiffs  
 are a banking corporation, created by an act of the Legis-  
 lature of *Pennsylvania*, and that they took the mortgage in  
 question to secure a loan of money made at their banking  
 house in that state. There is perfect justice and equity in  
 their demand, and I cannot see, that the objection is even  
 plausible. It is well settled, that foreign corporations may  
 sue here in their corporate name, and may prove, as a mat-  
 ter of fact, if the same were denied, that they were lawfully  
 incorporated. The *Bank of the United States* have sued in  
 our Courts. (1 *Johns. Cas.* 132.) In *Henriques v. Dutch*  
*West-India Company*, (2 *Ld. Raym.* 1532. 1 *Str.* 612.)  
 a suit was brought by a *Dutch* corporation, and sustained,  
 both in the K. B. and in the House of Lords, though it was  
 objected in that case, that a foreign corporation could not  
 maintain a suit. This Court ought to be as freely open to  
 such suitors as a Court of law, and it would be most unrea-

sonable and unjust, to deny them that privilege. They might well exclaim,

*Quod genus hoc hominum ?* —————  
~~hospitio prohibemur arenæ.~~

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2. Another objection is, that the plaintiffs had no right to take a mortgage concurrently with the loan, in order to secure it, and that their charter only authorized them to take mortgages for "debts previously contracted." If this objection was strictly true, in point of fact, I should not readily be disposed to listen to it. Perhaps, it would be sufficient for this case, that the plaintiffs are a duly incorporated body, with authority to contract and take mortgages and judgments; and if they should pass the exact line of their power, it would rather belong to the government of *Pennsylvania* to exact a forfeiture of their charter, than for this Court, in this collateral way, to decide a question of misuser, by setting aside a just and *bona fide* contract. But if we were driven to that necessity, we might, on colourable grounds, consider this to be a mortgage to secure a debt previously contracted, for it is in proof, that "previous to the date and execution of the mortgage, the plaintiffs had agreed to loan the money," and it was loaned and paid when the mortgage was delivered. The debt may be said to have been contracted for at the time of the agreement, and the mortgage taken for its security. But I do not rest on any verbal criticism of the kind. If the loan and the mortgage were concurrent acts, and intended so to be, it was not a case within the reason and spirit of the restraining clause of the statute, which only meant to prohibit the banking company from vesting their capital in real property, and engaging in land speculations. A mortgage taken to secure a loan, advanced *bona fide* as a loan, in the course, and according to the usage of banking operations, was not, surely, within the prohibition.

This Court will not, in a collateral way, decide a question of misuser of a foreign corporation.

3. It is further said, that to support and enforce this mortgage, would be repugnant to the act restraining unin-

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corporated banking associations. There is no allegation or proof of any fraudulent intent against the statute, and, certainly, none is to be intended or presumed. The act was made to prevent banking operations here, *within this state*; whereas, in the present case, the loans were made, delivered, and received, and the securities delivered at the banking house of the plaintiffs, at *Montrose*, within the commonwealth of *Pennsylvania*.

There is no solidity, nor justice, in either of the objections.

I shall, accordingly, decree a sale of the mortgaged premises, and the plaintiffs will be entitled, according to the prayer of their bill, to retain out of the surplus moneys, if any arising on the sale, the amount, with interest, of the moneys advanced by them to discharge the prior judgment on the land. The payment of the money was an act which they were compelled to do for their own safety, and the coercion was increased by the act of the defendant and the other parties to that judgment. The claim to indemnity out of the surplus funds is most manifestly just. The equitable doctrine of substitution applies to this case; and the plaintiffs must, for the sake of justice, be deemed to stand in the place, and to partake of the rights, of the judgment creditor. They have, under the circumstances of the case, and in the view of equity, his lien upon the fund.

Decree accordingly.



1820.

  
BOWEN  
v.  
CROSS.

**BOWEN** *against* **E. CROSS**, impleaded with **L. CROSS**.

Where there is a clear mistake in an answer, and proper to be corrected, the practice is to permit the defendant to file an additional or *supplemental* answer.

But this is allowed with great caution; and only where there is a mistake, properly speaking, as to a matter of fact.

**THE** defendant filed his answer on the 13th of *December*, 1819. In *January* term, 1820, he moved to dissolve the injunction heretofore issued in this cause, on the ground that the answer denied the equity of the bill. The motion was overruled. *April 14th.*

*Cushman*, for the defendant, now moved for leave to file a supplementary answer, or affidavit of the solicitor, that an account containing the *items*, or particular charges of the debt alleged to have been due from *Lyman Cross*, to this defendant, in *June*, 1818, was handed to the solicitor at the time of drawing the answer, and that the solicitor omitted to attach it to the answer, from a belief that it was unnecessary; and the answer only stated that *Lyman Cross* was justly indebted to this defendant in 1,121 dollars and 49 cents, without stating particulars, or referring to the account. And further, that the words *or in favour of B. M.* were omitted by him in drawing the answer, by mistake, and that he did not discover the omission until after the answer was filed.

*J. L. Wendell*, contra.

**THE CHANCELLOR.** The former practice in the *English* Chancery was, that where there was a clear mistake, proper to be corrected, the answer was taken off the file, and a new

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answer put in. But Lord *Thurlow* adopted a better course, by permitting a supplemental or additional answer to be filed, thereby leaving to the parties the effect of what had been sworn before, with the explanation given by the supplemental answer. The latter is the settled course now pursued in the *English Equity Courts*, (8 *Ves.* 79. 10 *Ves.* 285. 401. 1 *Wightwick*, 32. 3 *Price*, 83.) and it is the safer and wiser practice. But to obtain this permission, said Lord *Eldon*, (10 *Ves.* 402.) the defendant must state, by affidavit, that when he put in his answer, he did not know the circumstance upon which he applies, or any other circumstances upon which he ought to have stated the fact otherwise. In the subsequent case of *Livesey v. Wilson*, (1 *Ves. & Beam.*, 149.) Lord *Eldon* showed the great caution with which these amendments to an answer ought to be allowed. In that case, the defendant moved for leave to file a supplemental answer, upon affidavit, as to a mistake in a material point, and that it arose from his not stating the fact to his solicitor, or conceiving it at all material to be introduced into his answer, and that the omission was not by design, but arose purely through ignorance. The motion was, however, denied, on the ground that there was not the *mistake* of a fact, and that it was necessary for the defendant to have stated in his affidavit, that he meant to swear to his original answer in the sense he then desired to be at liberty to swear to. In subsequent cases, (2 *Ves. & Beam.*, 163. 256.) the Chancellor said, that the supplemental answer must be held strictly to a *mistake* clearly sworn to, and that "the Court did not yield to such an application without the most careful examination," and that an additional answer was always admitted with great difficulty, if prejudicial to the plaintiff. So, it has been held in the *Exchequer*, that an amendment is only allowed where a mistake has been made, in the true sense of the word, and not where a defendant has mistaken the nature of his defence. (1 *Fowler's Exch. Prac.* 390.)

The cases, both ancient and modern, in which the answer has been permitted to be amended, are generally those of mistake or surprise; (*Chute v. Dacre*, 1 Ch. Cas. 29. *Mullins v. Simmonds*, Bunb. 186. *Ely v. James*, Bunb. 295. *Gainsborough v. Gifford*, 2 P. Wms. 424. *Foster v. Foster*, 2 Bro. 619.) and, sometimes, it has been allowed where new matter had been discovered since the original answer was put in. (*Patterson v. Slaughter*, *Dickens*, 285.) A new fact has, likewise, been permitted to be added to the answer, under special circumstances; (*Wharton v. Wharton*, 2 Atk. 294.) and, in some cases, a dangerous admission of assets in an answer has been allowed to be restricted. (*Dagley v. Crump*, *Dickens*, 35. 2 Bro. 619. note. *Roberts v. Roberts*, cited in 1 *Fowler's Ex. Pr.* 390.) There is no precise and absolute rule on this subject; the question, as Lord Eldon said, is always applied to the discretion of the Court, in the particular instance. It has been allowed, after issue joined, on payment of costs of opposing the application, and withdrawing the replication. (*Fowler's Ex. Pr.* vol. i. 383—5.)

There can be no doubt that the application ought to be narrowly and closely inspected, and a just and necessary case clearly made out. In the present case, the defendant moves to make sundry amendments, but there is no ground for the indulgence, except as to the mistake sworn to have arisen on the ingrossment of the answer, and not discovered until after it was filed, and as to the omission of the solicitor to make the schedule referred to in his affidavit, a substantive part of the answer. The defendant handed the document to the solicitor when he was to prepare the answer; and, no doubt, it was his intention that it should have been used in a way the most fit and proper for his defence. The omission to annex it may be imputed to a mistake in the solicitor; and, after some hesitation, I am inclined to permit a supplemental answer to be filed in respect to those two omis-

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sions, and as to them only. In *Bryan v. Truman*, cited in 1 *Fowler's Ex. Pr.* 389. an answer was amended by annexing schedules therein referred to, and re-swearing to the same. This, seems to be a case very considerably in point. I shall allow to the plaintiff his costs for resisting this application, and direct that the defendant furnish him with an office copy of the supplementary answer *gratis*, and that the plaintiff have the usual time to except thereto. The allowance of costs is agreeable to the order in several cases, on the equity side of the *Exchequer*, cited in 1 *Fowler's Ex. Pr.* 383—8.

Order accordingly.

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In the Matter of A. WHITAKER and his wife.

The act concerning infants, of the 9th of *April*, 1814, (sess. 37. c. 108.) and the act of the 24th of *March*, 1815, in addition thereto, (sess. 38. c. 106.) authorising the sale of an infant's real estate, under the order and direction of this Court, do not apply to the case of a female infant who is married. It is not the usual practice of the Court to appoint a guardian to an infant *feme covert*: nor can the husband be a guardian for his wife, in such a case.

The acts were intended for the better education and maintenance of infants, and for their special benefit; not that the proceeds of the sale should be placed at the disposition of the husband of the infant.

*It seems*, that a female ward of this Court, is not of course discharged from its protection, by marriage; or without an order of the Court for that purpose.

*April 21st.*

PETITION stating, that *Betsy W.* was seized, as heir, to an undivided moiety of 208 acres of land, in the town of *Buffalo*, and county of *Niagara*. That the lot is unproductive, and could not well be divided without lessening

its value. That she is seventeen years of age, and married to *Alanson W.*, who is twenty-three years of age. That they have not much property, except the interest of the wife in the said land, and which is subject to the claim of dower of her mother, who is a widow. The petition, which prayed for a sale of the land, was accompanied with a Master's Report, under the 88th rule of the Court, which stated the land to be worth six dollars an acre, and that the facts stated in the petition were true. The Master, also, stated, that in his opinion, the prayer of the petition ought to be granted, and that the husband was a proper person to use and dispose of the proceeds. No security was offered.

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*A. Rice*, for the petitioners.

THE CHANCELLOR doubted whether this case came within the act of the 24th of *March*, 1815, entitled, "an act, in addition to the act concerning infants," or within the act of *April* 9th, 1814, to which the other was an addition.

The authority to sell the lands of infants, under these acts, was intended for the better education or maintenance of infants, and for their special and substantial benefit. The infant, in such cases, is declared to be a ward of the Court, and a guardian is to be appointed for that particular purpose, who is to give a bond to the infant, with competent security; and all sales by the guardian are to be reported to the Chancellor, to the end, that he may make order for the investment and disposition of the proceeds, "so as to secure the same to the infant, in such way and manner, as may seem most for his or her benefit and advantage."

It seems to be clear, that the husband cannot be such guardian, for he cannot give a bond to his wife; and, probably, the provisions of the act were not intended to apply to the case of a female infant who is married; for it has

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never been the course and practice of the Court to appoint a guardian to an infant *feme covert*. The guardianship of a daughter determines with her marriage. It was so held, in Lord *Shaftsbury's* case, and there is no instance, as Lord *Hardwicke* observed, (1 *Ves.* 160.) in which a guardian had been appointed to a female infant after her marriage. If there be any doubt in the case, it is not, that a guardian can be appointed, but whether a female ward be necessarily discharged, upon her marriage, from the protection of the Court, without a special order from the Court. (*Mendes v. Mendes*, 1 *Ves.* 89. 91. S. C. 2 *Atk.* 625. *Roach v. Garvan*, 1 *Ves.* 157—160. *Belt's Supp.* 86, 87.) Lord *Eldon* thought it did not. (*Belt's Supp. ibid.*)

In the present case, the husband seeks to be the guardian, without surety, and the object is to turn the land of his infant wife into money, and to appropriate the use of it to himself. This is a purpose not within the intention of the act, and the power to sell cannot be given until a guardian be appointed with sufficient surety; and the husband cannot be such guardian, nor would the proceeds of the sale be placed at his disposal, until the wife became of age.

Without, however, declaring, that the Court cannot, in any case, or under any circumstances, authorize the sale of the lands of an infant *feme covert*, the petition in the present case is denied.

Petition, denied.

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WATSON and HARBOTTLE *against* RENWICK.

To entitle the plaintiff, before hearing, or publication, or issue joined, to call for the inspection of papers, &c. it is not sufficient, that there has been a general reference to them in the answer. They must be *described*, with reasonable certainty, in the answer, or in the *schedule* annexed to it, so as to be considered, by the reference, as *incorporated* in the answer, which must admit them to be in the *possession* or *power* of the defendant: And it must appear that the plaintiff has an *interest* in the production of the papers, books, or instruments sought after.

PETITION of the plaintiffs, stating that they, as assignees of *Benjamin Gray*, of *Manchester*, in *England*, a bankrupt, filed their bill against the defendant, as administratrix of *William Renwick*, late of the city of *New-York*, deceased, for discovery and account of an unsettled copartnership, and the dealings between *B. G.* and *W. R.* as partners in trade. That the bill required the defendant to set forth all the books, papers, accounts, &c. relative to the matters of the bill, and such as have been burnt, or destroyed by her. That the defendant, in her answer, has not set forth such a list or schedule of the books, &c. though she, in her answer, makes frequent reference to the books, accounts, and papers of *W. R.*, deceased; and alleges, that certain accounts and papers of *W. R.* were sent to *England* in 1815, and that many of them were destroyed by fire in 1817, though the answer does not distinguish which were sent to *England*, which were destroyed, and which are still in her possession. That no replication had been filed. The plaintiffs *prayed* for an order, that the defendant deposit, under oath, with an officer of this Court, all the books, papers, letters, accounts, memoranda, vouchers, and writings, as called for by the bill, as far as the same are in the possession or power of

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the defendant; and that the plaintiffs may cross-examine her touching the same, and may have leave to examine, take copies, and make extracts from the same.

*Wells*, for the plaintiffs, in support of the petition.

*Henry*, contra.

The bill, filed *February* 2d, 1819, and the answer, filed *September* 13th, 1819, were referred to by the counsel. Such parts of them as were material on this motion, are noticed by the Court.

THE CHANCELLOR. This is an application for a very sweeping order, touching the production of books and papers, referred or alluded to in the defendant's answer.

The bill is for discovery and account, and the prayer in it is, that the defendant, who is sued as administratrix of her late husband, *William Renwick*, deceased, may set forth "a list or schedule of all such books, papers, letters, accounts, memoranda, vouchers, and writings, in her custody, possession, or power, relating to the matters set forth in the bill, and a like list of all such of them as have been burnt or destroyed by her," &c. The petition states, that she has not by her answer set forth such list or schedule, but has neglected so to do, although her answer makes frequent reference to the books, accounts, and papers of *R.*, and of *R. & G.*; and alleges, that certain accounts and other papers belonging to *R.* were sent to *England*, and others of them were destroyed by fire in 1817. The motion is, that she be ordered to deposit, under oath, for the inspection of the plaintiffs, "all the said books, papers, letters, accounts, memoranda, vouchers, and writings, as called for by the bill, so far as the same are in her possession or power, or under her control."



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The answer has been in for some months, and was not excepted to. If it had not met sufficiently the inquiries in the bill, the plaintiff should have taken exceptions. It must, upon this motion, be taken to be a good and sufficient answer; and the question, then, is, whether the answer has laid a proper ground for the present motion. The answer does, indeed, as stated in the petition, frequently, but in a very general manner, and without particular specification, refer to the books and papers relating to the firm of *R. & G.*, and alleges certain facts *as appearing* from the said books and accounts. It speaks, in one or two places, of books, papers, and writings of *R.*, *in her possession*; and, in another place, she denies that it appears by the said books of the former firm of *R. & G.*, that either of the two ships therein mentioned, were purchased with joint funds or on joint account; "but for greater certainty, she refers to the books of account of the said partnership, in case the same shall be ordered to be inspected by the plaintiffs." The answer has not, however, laid a sufficient foundation for the motion, according to what is now understood to be the settled doctrine and practice in Chancery. To entitle the plaintiff, before hearing, or publication, or issue joined, to call for the inspection of papers, it is not sufficient, that there has been a general reference to them in the answer. They must be *described* with reasonable certainty, in the answer, or in the schedule annexed to it, so as to be considered, by the reference, as incorporated in the answer, and they must be admitted by the answer to be in the *defendant's possession or power*; and it must also appear that the plaintiff has *an interest* in the production of the papers, or books, or instruments sought after. A *voluntary offer* of the defendant to produce a deed, may dispense with some of those safeguards which the practice gives to the defendant; but without such an offer, I apprehend the rule to be, that these circumstances must appear by the answer to entitle the plaintiff, in ordinary cases, to the effect of his motion. There may, indeed, be special cases,

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(but of which I am not now speaking,) in which it would be deemed necessary, in the exercise of the discretion of the Court, to require the production of papers upon easier terms; but there is nothing, in the present instance, that entitles the plaintiffs to any relaxation of the rule.

It will be useful to look into the cases, and to note the history of the practice on this point.

In *Herbert v. Dean and Chapter of Westminster*, (1 P. Wms. 773.) Lord Macclesfield granted an order, that the defendants in a cross cause, should produce the vestry books before a Master; and he allowed the motion, on the ground, that the defendants had, in their answer, referred to them, "for fear of a mistake, and by that means had made them part of their answer; and for that reason, the Court ought to let the other party see them; otherwise, there would be no relying upon the answer of those who are thus guarding themselves by references, for fear of a mistake, and to avoid exceptions to their answer."

Here it is to be observed, that the books sought for, were considered as incorporated, by means of the reference, into the answer, as part of it.

So, in *Bettison v. Farrington*, (3 P. Wms. 363.) on a bill for discovery of title, the answer showed, that a certain lease and release were executed, referring to the deeds in his custody. Lord Talbot confirmed an order on the defendant for the production of the deeds, and observed, that "at the hearing, it was admitted, the Court would make such an order, and that the defendant, by referring to the deeds in his answer, *had made them part thereof*."

This decision was placed upon the same ground as the former; but the learned editor, Mr. Coxe, adds a *quære*, whether the bare referring to a deed, without setting it forth in *hæc verba*, will make it part of an answer. Lord Rosslyn (4 Ves. 71.) thought the expression in the case, "at the hearing," must have meant at the trial at law, for there is no hearing upon a bill of discovery; and Lord Eldon

said, that subsequent cases appeared to question the doctrine of this case on both its points. It had, also, been admitted, in a case prior to this, (*Hodson v. Earl of Warrington*, 3 P. Wms. 35.) that a deed was not part of a deposition, unless mentioned therein *in hæc verba*, and that it was not sufficient to refer to it in the deposition.

In *Gardiner v. Mason*, (4 Bro. 479.) Lord Rosslyn ordered that a paper, *specifically referred to* in the answer, and admitted to be in the defendant's custody, be produced for the plaintiff's inspection; and in *Shaftsbury v. Arrowsmith*, (4 Ves. 66.) he made a like order, that the defendant give inspection of certain deeds which he had *set out in the schedule* to his answer.

The cases of *Smith v. Duke of Northumberland*, (1 Cox's Cases, 363.) and of *Burton v. Neville*, (2 Cox's Cases, 242.) admit that the plaintiff must show, or make it appear, that he has an interest in the papers called for, to entitle him to the production of them.

The reference, in the case before me, to certain books of accounts, *when produced*, is quite analogous to the case of *Darwin v. Clarke*, (8 Ves. 158.) where an answer admitted such a deed was executed, craving leave to refer it to when produced. But Lord Eldon said, that such an answer would not do, as there was no admission that it was in the possession or power of the defendant.

In *Atkyns v. Wright*, (14 Ves. 211.) Lord Eldon observed, that the practice formerly was, that where the answer did not describe, either in the body of it, or by schedule, which is part of the answer, the deed or paper sought to be produced, there was no order made for the production: In that case, as in this, the answer referred to divers deeds, accounts, and papers, and did not *describe* them. It admitted possession, but did not offer to produce a particular deed; and an offer to produce a deed, *as the Court should direct*, or if the Court should require it, was held to be a

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qualified, not a voluntary offer which ought to fix the defendant. It was only a submission to the discretion of the Court, and not a dispensation from the exercise of that discretion, as to the propriety of a rule for the production; and for these reasons, the rule upon the defendant for the production of papers, was denied. The opinion of Lord Eldon upon the last point, seems to have been according to the case of *Stanhope v. Roberts*, (2 Atk. 213.) where a like offer only bound the party to produce the paper, *if the Court should think it necessary*. The Court, upon such a qualified offer, will enter fully into the merits of the application; and an order upon the defendant to produce papers upon such an offer, was denied in the case of *The Attorney General v. The City of Coventry*, (Bunb. 290.)

The cases which I have referred to, sufficiently establish the general doctrine which I have declared, and do not afford any just ground for the motion in the present case.

The practice to be deduced from the preceding cases, is still more explicitly announced in two recent cases before Lord Eldon. In *Evans v. Richard*, (1 Swanston, 7.) there was a motion to produce letters and other documents referred to in the answer, and the Lord Chancellor observed, that the answer must contain an admission, that the documents in question were in the custody of the defendant, and that the rule for producing papers rested on the principle, that those papers were, by reference, incorporated in the answer, and became a part of it. And in the still later case of *The Princess of Wales v. Earl of Liverpool*, (1 Swanston, 114.) he said, it was necessary to the success of such a motion, that the defendant admitted in his answer, that the papers were in his custody or power, and which admission was not made by merely referring to the papers. Nor would the mere reference make documents *part of an answer*. for the purpose of production, though, perhaps, by amending the bill, and addressing further questions, the defendant might be compelled to make the documents part of

his answer for that purpose, and to make such an admission of possession as would authorize the order. The possession of the deed must be, by the answer, *fixed* in the defendant; and the reason is, that if the defendant should refuse, under the order, to produce the instrument, the Court could not apply process to enforce obedience, because no *constat* appears on the pleadings, that the instrument is in possession of the defendant, and that he has the power to obey. Additional, if not better reasons, are assigned by the Court of Exchequer, in *Erskine v. Bize*, (2 *Cox's Cases*, 226.) for the necessity of a direct admission in the answer of the fact of possession, or control of the paper, before a rule can be made to produce it.

There is wisdom in the cautious policy of the Courts on this head, and which is alluded to by Lord *Eldon*. A defendant, in his answer, accompanies the production of a deed with an explanation of all the circumstances, but a compulsory production under an order, deprives him of the security which the answer affords.

There are so many objections raised in the answer, in the present case, to the general equity of the bill, and in bar of any right or title whatever on the part of the plaintiffs, that I should not feel disposed to depart from the strict practice on this occasion, until these objections had been discussed and removed. The plaintiffs will be in season to demand an inspection of books and papers relating to the partnership transactions between *R.* and *G.*, when an account shall be directed to be taken. It cannot be reasonable to give them, in the first instance, an inspection of the books and documents in possession of the defendant, and belonging to her husband's estate, merely to see if they cannot discover in them some ground of action.

Motion denied, with costs.

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ROGERS and others, *Executors of HENDERSON, against*  
ROSS, *Executrix of Ross.*

By a devise of *all the rest and residue of the real estate of the testator, the rents and profits*, from the testator's death to the time of vesting the estate, will pass: and whoever takes the legal estate, in the mean time, will be responsible for the profits; for the rents and profits, as well as the estate itself, may be given, by way of *executory devise*.

The heir at law may be considered as a *trustee*, where it becomes necessary, to carry the intention of the testator into effect.

The rents and profits may accumulate in his hands, for the benefit of the executory devisee, until the vesting of the estate. This Court may, if necessary, appoint a *receiver* of them for that purpose.

And where the executory devisee was illegitimate, and it did not appear that the testator left any lawful heir, and no person appeared to claim the inheritance, the *executor* of the testator who had taken possession of the real estate, and was appointed guardian of the devisee, and received the rents and profits from the death of the testator, to the happening of the event on which the estate vested, was held accountable for them, to the executory devisee.

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THE original bill was filed, *March 28th, 1819, against Robert Ross, the testator.* The plaintiffs' testator, *William Henderson*, died the 19th of *January, 1812*, having, by his last will, appointed the plaintiffs his executors. *Alexander Henderson*, the father of *W. H.*, made his will, in *December, 1804*, by which, after directing his debts to be paid, and giving certain legacies, he devised *all the residue of his estate, both real and personal, to his son, W. H.*, (then living with him,) *when he should arrive at the age of twenty-three years*; and he appointed *John Cortius*, of *London*, in the kingdom of *Great Britain*, and *John Watts*, and *Robert Ross*, of the county of *West Chester*, in this state, his executors. The testator died soon after making his will. *Robert Ross* alone proved, and took upon himself the execution of the

will. *W. Henderson*, at the death of his father, was seventeen years old, and *Robert Ross* was duly appointed, on the 11th of *January*, 1805, guardian of his person and estate. His father left a large personal estate, more than sufficient to pay all the debts and pecuniary legacies.

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In the latter part of the year 1810, or 1811, *R. R.* rendered to *W. H.* then being above twenty-one years of age, an account of his executorship and guardianship, by which it appeared, that after deducting debts, and legacies, and expenses paid as guardian, there was a balance due *W. H.* of 462 dollars and 90 cents. Though, about that time, there was an acquittance or discharge executed by *W. H.* to *R. R.* for that sum, yet the plaintiffs charged that no part of the money was paid, but the whole remained due to *W. H.* at his death.

The bill further charged, that there was due to *A. H.* or *W. H.*, a large sum of money, in *Calcutta*, which *R. R.* had, or might have received, and which he had not accounted for as executor or guardian. That *A. H.* died seised of a valuable farm at *Pelham*, in the county of *West Chester*, and which passed to *W. H.* by the will of *A. H.* That *R. R.*, soon after the death of *A. H.* entered upon, and took possession of the farm, and received the rents and profits, until *W. H.* attained the age of twenty-three years; and that the yearly value was 1,000 dollars. The plaintiffs prayed for an account and payment of the sum of 462 dollars and 90 cents, with interest, from the time the account was rendered by *R. R.*, and the *Calcutta* debt, and the rents and profits of the farm at *Pelham*.

*R. R.* died before answering the bill; and a bill of revivor was filed against *Ann Sharp Ross*, his executrix, who put in her answer to both bills. The defendant admitted the making of the wills of *A. H.* and of *W. H.*, and their deaths, and the appointment of *R. R.* as guardian of *W. H.* That the account was rendered by *R. R.* to *W. H.*, and was not paid when the discharge was executed; that it was rendered

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about the 21st of *February*, 1811, when *W. H.* was twenty-three years of age. That the balance was retained by *R. R.* with the consent of *W. H.*; that the same was to be advanced to *W. H.* from time to time, as occasion might require, and that *R. R.* had, accordingly, advanced to him the amount of 159 dollars and 8 cents; that *W. H.*, by his will, bequeathed to *R. R.* a legacy of 400 dollars, which had not been paid, and which she set off against the balance belonging to the estate of *W. H.* The defendant denied all knowledge or belief of the debt alleged to be due in *Calcutta*. She admitted that *A. H.* died seised of the farm at *P.* which passed by the will to *W. H.*, on his attaining the age of twenty-three years. The defendant averred, that *W. H.* was the illegitimate son of *A. H.*, and not his heir at law, and, therefore, not entitled to the rents and profits of the farm, which accrued previous to his attaining the age of twenty-three years; and she submitted whether she was bound to account for such rents and profits. She admitted that, as executrix of *R. R.* she had received assets to the amount of 20,000 dollars.

A replication was filed, and witnesses examined, and the cause was brought to a hearing on the pleadings and proofs.

The cause was argued by *T. A. Emmet*, and *P. J. Munro*, for the plaintiffs, and by *Harison* and *Wells*, for the defendants.

*For the plaintiffs*, it was contended, that admitting *W. H.* to be the illegitimate son of *A. H.*, it confirms the intention of the father, who had no heir at law, to give to the object of his bounty and affection, as expressed in the will, "all the residue of his estate, both real and personal." There is a peculiar hardihood in the claim set up by the defendant. *R. R.* without any pretence of title, but as guardian of *W. H.*, received the rents of the real estate, from the



death of *A. H.* until *W. H.* arrived at twenty-three years of age, and his executrix now refuses to account for them to the person, in whose right they were received, under the pretence that she may possibly be made to account for them to the heir at law, though there is no such person in existence, or to the people of the state, who have never taken a step towards an *escheat*, and whose title can commence only after an office found.

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This is a sufficient answer to any objection as to the want of proper parties; for there is no known heir at law, and the people have no interest, and the estate itself not having *escheated*, and no office having been found, the people could not now acquire any interest in the rents or profits. Besides, the party who received the rents, or his legal representative, never having filed a bill of interpleader, but contesting the right of the plaintiffs, all necessary parties are before the Court. If the plaintiffs are entitled to the rents and profits, they can recover them from the legal representative of the person who received them as a trustee; and if the defendant is not accountable for them to the plaintiff, she is accountable to no person.

It is true, that if the testator had devised, specifically, the farm at *Pelham* to *W. H.* when he attained the age of twenty-three years, he being an illegitimate child, the devisee would not, by force of the words, be entitled to the intermediate rents and profits, but they would descend to the heir at law, if not otherwise disposed of by express words or necessary implication. (*Bullock v. Stones*, 2 *Ves.* 521. *Stephens v. Stephens*, *Cases temp. Lord Talbot*, 228. *Gibson v. Lord Montfort*, 1 *Ves* 485.) Suppose, then, that the testator, after a specific devise of the farm, in fee, to his son *W. H.*, on his arriving at twenty-three years of age, had devised all the rest of his estate, real and personal, to a third person, would not the rents, intermediate the death of the testator and the vesting of the executory devise, have passed to such third person, under the authority of the case

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of *Stephens v. Stephens*? Suppose, after a specific devise of his farm, and giving specific legacies, the testator had devised all the rest and residue of his real and personal estate to his son *W. H.*, when he should attain the age of twenty-three years, would not those rents and profits, under the authority of *Gibson v. Lord Montfort*, pass, by these words, accumulate in the mean while, and vest in *W. H.* when he attained the age of twenty-three years? The position, both as to real and personal estate, that a devise of "all the rest and residue" will pass the rents and profits, from the testator's death to the time of the vesting of the executory devise, has not only been decided, but is clearly recognised by the best elementary writers. (*Fearne on Ex. Dev. Powell's ed.* 435, 436, 437. *Butler's ed.* 544, 545, 546. 6 *Cruise's Dig.* 520. tit. *Devise*, ch. 20. s. 40. and the cases there referred to, especially *Rogers v. Gibson*, 1 *Ves. jun.* 485.) Then what more is wanting to entitle the plaintiff to the rents and profits? Though trustees were interposed in the case of *Gibson v. Lord Montfort*, yet Lord *Hardwicke* decided on the general principle which has been stated.

As to any supposed difficulty, for want of any person bound to receive the rents and profits, the same difficulty would exist as to the farm itself. The law allows this kind of devise, and it is not affected by any consideration of who is, or whether there be, any heir at law, to whom the estate might, in the mean time, descend. There is no principle of law which establishes, that an executory devise of an estate in fee simple would not take effect, if the testator had no inheritable blood. Whoever takes the freehold estate itself, before the executory devise vests, takes the rents and profits, in the same way, subject to their being divested, and accounted for, on the happening of the contingency: or, if a trustee is wanting to carry the intention of the testator into effect, this Court has full power to supply the deficiency; and on an application for that purpose, a receiver might

have been appointed, to take the rents and profits, and put them out for accumulation, to be ultimately disposed of to the devisee, if he lived to the age of twenty-three years; and if he died before, to be accounted for to such person as might show himself entitled to them. The defendant's testator, indeed, took that office upon himself, without any appointment by this Court; but he is not the less accountable, according to the rules of this Court. If the testator had devised his farm to his son, as he has done, and had expressly devised the rents and profits accruing in the intermediate time, to him, could it be argued, that the latter devise would not pass any thing, for want of a person, other than the heir at law, to take the legal estate? There is not any ground or reason, after the decision of Lord *Hardwicke*, in the cases cited, for saying, that they would not pass by the general and sweeping words of the residuary devise. By the words, "all the rest and residue of his real and personal estate," the testator devises every thing not specifically devised, and which he could dispose of by will, at the time of its execution. Will it be said, that the testator had no power to dispose of the intermediate rents and profits? Or that he has specifically devised them? If not, they must necessarily pass by the residuary devise. It is not easy, perhaps, nor is it necessary, to ascertain the object of the testator. He may, probably, have intended, that his son should have no control over the property, until he arrived at the age of twenty-three years; and in endeavouring to impose this restriction, he has inartificially, and incautiously, perhaps, deprived him of the rents and profits, for his education and maintenance, in the mean time, and made them to accumulate, as a fund for him, when he should become possessed of the estate. It is clear, that he meant that all should go to that son, if he arrived at the age specified.

The observation of Lord *Hardwicke*, that the real and

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personal estate being comprised in the same sweeping clause, is a strong argument against a resulting trust to the heir at law, is certainly of great force, when used to show the intention of the testator, in cases where no decisions have fixed a contrary rule; and it applies in all its strength to the present case.

*For the defendant*, it was argued, that if the devise to *W. H.* was an *executory devise*, which was admitted, it was only to take effect when the devisee arrived at the age of twenty-three years. The limitation was of the substance of the gift, and if he did not take at that age, it would be void. The question, however, as to the intermediate rents and profits, may be one of some difficulty. As the testator's real estate consisted only of the farm at *Pelham*, it will not be contended, that if he had specifically devised it to his illegitimate son, when he attained the age of twenty-three years, and then to him and his heirs, that the son would have been entitled to the intermediate rents and profits. [*Fearne on Ex. Dev. Powell's ed.* 434. *Cases temp. Talbot*, 44. *Hopkins v. Hopkins*.) In *Bullock v. Stones*, (2 *Ves.* 522.) Lord *Hardwicke* says, "Where there is an executory devise, whether of a legal estate, or of a trust estate in this Court, the rents and profits go to the heir at law; because the legal estate in the one case, or the trust in the other, descend, in the mean time, to the heir at law." It is true, that from a clause in the will in that case, directing his trustees to have the executory devisee well brought up and educated, Lord *H.* observed, that "the son's education must come out of the rents and profits, at least, as far as his maintenance and education goes." This, however, depended on the particular provisions of the will in that case, and shows, that the general doctrine was thought otherwise. It must be admitted, that the testator may, by express devise, or necessary inference, substitute a person to take the intermediate rents and profits in place of the

heir. And it is true, that the language of the elementary writers, cited by the plaintiffs' counsel, is, that a devise of all the rest and residue of real estate, will pass as well the profits from the testator's death, to the time of the estate vesting, as from the determining of the first estate, to the vesting of a subsequent one. But this language may well be considered as referring only to an absolute and immediate devise of such rest and residue, or such devise as must take effect, at all events, in some person or other. In the case of *Stephens v. Stephens*, there was an *absolute* devise of all the residue of the testator's real estate to his son-in-law, T. S., (who was not the executory devisee,) which took effect immediately on the testator's decease. He, therefore, was substituted to the heir at law, to whom nothing could descend. The executory devises took effect, in succession, as soon as the devisees came in being. But the rents were not made to *accumulate*, in the mean time, for the benefit of the executory devisee, if there, afterwards, should be one. This case, therefore, does, by no means, establish the doctrine so broadly laid down. In the case of *Gibson v. Lord Montfort*, the legal estate, by the will, was immediately vested in trustees; and there was not only a residuary *executory* devise taking effect, as soon as the daughter had a child, or children, but an *absolute* devise, in case of their failure, to other persons. Besides, there were other circumstances in the will, plainly indicating the testator's intention to have the rents and profits accumulate, and on which Lord *Hardwicke* appears to lay great stress. It is true, that he, also, lays stress on the real property being coupled with the personal; and, therefore, thinks that the doctrine peculiar to the personal property, is to govern the construction as to the real, which would have been different, if it had stood alone. With all deference to so great a man, the necessity of determining, as to one species of property, by a rule applicable to property of a different description, seems not to be very apparent. If it was so, why should

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he think it necessary to fortify his opinion by other considerations. And why should he, in other cases, think it proper to understand the same words in a different sense, when applied to real or to personal property? In the cases, however, just referred to, and in cases of a similar nature, there is a person, other than the heir at law, who takes the legal estate, or who, having it, is bound, as a *trustee*, by the terms of the devise, at the death of the testator. In the present case, there is no trustee; and if the devise is *executory*, the legal estate must go immediately to the heir at law, if there is one, for the freehold cannot be in *abeyance*. Now, no case can be found of this description, where the heir, necessarily taking an estate, for want of a person immediately entitled to it, has been converted into a trustee. No provision is made in the residuary devise, for any person to take the rents and profits, until *W. H.* should come of age. The devise of the residuary estate to him, was as much *executory* as the devise of the land itself; and the executors, *as such*, had no right to interfere with the real estate, unless to sell it for the payment of debts, in the way which the law has prescribed, upon failure of personal assets. Hence, probably, the solicitude of Lord *Hardwicke* to show, in the case of *Gibson v. Montfort*, that the trustees took an immediate fee.

This objection, at first view, appears fatal to the present demand. If the heir at law alone could rightfully receive the mesne profits, *he*, or those who stand in his place, ought to have been made parties to the suit. *W. H.*, or his representatives, could not lawfully receive the rents and profits; for, at any rate, it can never be maintained, that he was entitled to the mesne profits, if the devise was *executory*, before he arrived to the age of twenty-three years, when he took possession of the farm. From that time to the commencement of this suit, neither *W. H.* nor his representatives, took any legal measures to obtain the rents and profits, but have, until a short time before the bringing the suit, acquiesced in

the possession of them by *R. Ross*, and by this defendant, as his legal representative, for whoever might be legally entitled to them; and after such a lapse of time, this Court is called upon to decree in favour of the plaintiffs, without bringing the proper parties, or those who may be so entitled, before the Court.

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**THE CHANCELLOR.** This case has been very well argued, and the main question is, whether the plaintiffs are entitled to an account of the rents and profits of the real estate devised to their testator, accruing between the death of *Alexander Henderson*, and the arrival of the devisee to the age of twenty-three years.

The words of the will of *Alexander Henderson*, on which the question arises, and which follow some pecuniary bequests, are these: "I give and bequeath all the residue of my estate, both real and personal, to my son, *William Henderson*, (now residing with me,) when he shall have attained the age of twenty-three years." He attained that age, and died. His father was seised of a real estate in the county of *West Chester*, and the rents and profits previous to the time that the estate absolutely vested in his son, *W. H.*, were taken by *Robert Ross*, the sole acting executor of the father's will.

If *W. H.* was the lawful heir of *A. H.* there would be no doubt of his right to the rents and profits, for in that case he must have been entitled to them either in the capacity of heir or of devisee. But the defendant has questioned, and, I think, successfully questioned, his right to those intermediate profits, as heir, by showing that he was an illegitimate offspring of his father, by a woman of *Bengal*.

The inquiry is then confined to his claim as a residuary devisee.

A devise of all the rest and residue of the real estate, will pass the *profits*, from the testator's death to the time of the vesting of the estate; and whoever takes the legal estate in

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the mean time, will be responsible for those profits; and they, as well as the estate itself, may be given by way of executory devise.

One of the earliest cases, and a leading one on the subject, is that of *Stephens v. Stephens*, (*Cases temp. Talbot*, 228.) It was a case sent to the K. B. for their opinion, and Lord Chancellor *Talbot* decreed according to that opinion, and expressed his satisfaction with it.

The facts were simply these: S., by will, devised to his grandson A., his lands in fee, &c.; but in case his grandson A., should happen to die before he attained the age of twenty-one, then he devised his lands to his grandson B., in fee; and if he should die as aforesaid, then he devised his lands to such other son of his daughter Mary, as should happen to attain the age of twenty-one, in fee; and for default of such issue, then he devised the same to his granddaughters by his daughter Mary; and for want of such issue, then he devised the same to his brother C.; and all the rest and residue of his estate, real and personal, he bequeathed to his son D., in fee.

A third grandson claimed the estate as residuary devisee, and Mary, the daughter, claimed it as heir at law.

The Court of K. B. held that the devise to such unborn son, &c., was good by way of executory devise, and that the subsequent limitations were, of course, good; and, if one failed, the others would take place in succession; and if they all failed, the estate would go to C., by virtue of the last remainder, in fee. And that, with respect to the profits received since the death of the grandson A., or to be received until the estate should vest in some one person, by force of the executory devise, or go over to the remainder man, they belonged to D. by virtue of the residuary devise in the will, as an interest not before disposed of by the will.

This case establishes the position, that the intermediate profits arising on an estate given by way of executory devise, will pass by a devise of all the residue of the estate.

The next important case on this point is *Gibson v. Lord Montfort*, or, as it is sometimes cited, *Rogers v. Gibson*. (1 Ves. 485. Amb. 93. S. C.) The testator devised all his estate to trustees, in trust, to pay legacies, &c., and then, "as for and concerning all the rest, residue, and remainder, of the real and personal estate, after provision made for the payment of the legacies, he gave to such child or children as his daughter should have lawfully begotten, &c.; if his daughter should die without such issue, then to two other persons, to be equally divided between them."

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One question in the case was, concerning the disposition of the surplus rents and profits of the real estate, after satisfaction of the charges, till such time as the executory devise came in *esse*; and whether they went to the first taker of the residue, or to the heir at law?

It was said, on behalf of the devisee, that though, generally, the intermediate profits of an estate, to take effect on a future contingency, as well as the estate itself, would descend, yet that here the testator intended to comprehend all the profits under the term residue; that as it was admitted that giving the personal estate gave the profits of it, so by mixing both estates, the testator showed his intent, that the intermediate profits of the real estate should go the same way. It was urged, on the other hand, in favour of the heir, that here was an omission to give the intermediate rents and profits ~~fit~~ for by a gift to one not in *esse*, nothing passed immediately, and the estate, in the mean time, descended; that though the whole accumulating profits of the personal estate would go by the devise, by reason of the word *residue*, yet the same rule of construction was not applicable to the real estate; and that if ever favour was shown to an heir, it ought to be in the case of an illegitimate daughter amply provided for.

Lord Hardwicke said, the question was, whether the surplus profits were included, and went by the devise of the residue, or were to be considered as part of the real estate undisposed of;

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and he admitted the heir would take the intermediate profits, if not sufficiently devised. They are thrown upon the heir by the law, as Lord Talbot said, in *Hopkins v. Hopkins*, (*Cases temp. Talbot*, 44.) for want of some other person to take. It was rightly admitted, that the profits of the personal estate passed by the residuary devise. Where the residue of the personal estate is disposed of, it will always take in the intermediate profits. He said, it was also admitted, that the testator might, by express words, dispose of the rents and profits of the real estate, accruing before the contingency happened, *either to the child when born*, or to the person to take when she died without issue; and the only question was, whether, by express words, or necessary implication, they were, by the will, given away from the heir, and he was of opinion that they were. The testator had plainly declared an intention to dispose of his whole estate, and it was "pretty hard to say, that in any case, where one devises all the rest and residue of his real estate, the heir should be enabled to claim any thing out of it; for how can he claim or take these intermediate profits?" He adverted to the case of *Stephens v. Stephens*, as material to the construction of the words *rest* and *residue*, and as determining, that those words would take in the intermediate profits of the real estate devised on contingency, or by way of executory devise, and which would otherwise go to the heir at law, to whom the real estate would, in the mean time, descend. The construction given in that case, meets, more probably, the testator's intention, *when the devise is to a person in being, than when to one not in esse*. So, also, when both real and personal estates are comprised in the same sweeping clause, it is a strong argument against the claim of the heir, since it is admitted, that the surplus profits of the personal estate will pass by the devise. The surplus rents were, therefore, in this case, to be received by the trustees, and accumulated and laid up.

This case approaches much nearer than that of *Stephens v. Stephens*, to the one before me, for here the devise of the profits, as well as of the estate, passed to the executory devisee by the same residuary clause.

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The same construction was given to the disposition of the *residue* of the real and personal estate, in the case of the *Duke of Bridgewater v. Egerton*, (2 *Ves.* 122.) That was a devise of real estate to the wife during widowhood, and then to the eldest son, *who should attain twenty-one years* of age. The wife married during the minority of the son, and Lord *Hardwicke* held, that the intervening profits, or those arising between the determination of the wife's interest and the majority of the eldest son, would fall into the *residue* of the real and personal estates respectively.

The case of *Bullock v. Stones*, (2 *Ves.* 521.) shows, that the testator may, by implication, as well as by express words, substitute a person to take the intermediate profits of a real estate descending to the heir, pending the contingency of an executory devise. The testator in that case devised all his real and personal estate in trust, and after debts and legacies paid, then to the first son of *A.*, (who was his heir at law, and under age, and had no child,) when he should attain twenty-one years, and *with a direction for his proper maintenance and education*. It was held, that the profits of the personal estate would accumulate and not go to the heir, and that the rents and profits of the real estate would descend to him, for where there is an executory devise, whether of a legal or trust estate, the rents and profits go to the heir, with the legal estate, in the one case, and the trust in the other. But the heir's son, under this direction in the will, would be entitled to the benefit of the rents and profits *from his birth*, so far as the same were requisite for his maintenance and education.

Upon the doctrine of these cases, there would seem to be no doubt, that the intermediate profits of the real estate

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would go, by the general and sweeping words of the will, as well as the estate itself, to the son, *W. H.*, upon the vesting of the executory devise at the age of twenty-three, and that they would accumulate in the mean time, in the hands of the heir, for his benefit. It is pretty evident, that the testator did not intend to leave any part of his estate undisposed of. He has coupled together the disposition of his real and personal estate; and it is admitted in all the cases, that the profits of the personal estate go with that estate, under the word *residue*, to the executory devisee. This is an argument, according to Lord *Hardwicke*, for giving the same construction to the whole clause, and the construction presses the stronger, if the disposition, as here, be to a person in being at the time of making the will. Indeed, the case of *Gibson v. Lord Montfort*, would be perfectly analogous, (for there, also, was an illegitimate child who was the object of the devise,) if here had been a special trustee created to take the estate. The counsel for the defendant seemed to place reliance upon this ground, and it was said, that there is no case in which the heir necessarily taking an estate, for want of a person immediately entitled to it, has been converted into a trustee of the profits for the devisee. It was, also, said, that there must be an absolute devise of the intermediate profits depending on the contingency of an executory devise, to some person who can immediately take. But in *Gibson v. Lord Montfort*, there was no such absolute and immediate devise of the profits. They were given by way of executory devise, as well as the principal estate, and, as Lord *Hardwicke* observed, they were to be "received by the trustees, accumulated and laid up," to meet the event of the vesting of the estate. And why cannot the heir be considered as a trustee, when it becomes necessary to carry the intention of the will into effect? I presume, this Court might have appointed a *receiver* of those rents and profits, for the purpose of accumulation, and to abide the termination of the executory

devise. It will do it in many cases for the security of the fund, before any decision as to the right. The heir may be a trustee for those holding beneficial interests under a will. If a mortgage debt should pass, by a will of the mortgagee, without conveying the technical legal estate along with it, the heir of the mortgagee would be a mere trustee of the legal estate to the person to whom the debt was bequeathed. It is admitted, in *Gibson v. Lord Montfort*, that the profits may be given, by way of executory devise, to the very person to whom the estate is given on the like contingency.

This doctrine of accumulation is quite familiar in the practice of the *English* Chancery, and was well and most elaborately discussed, in the great case of *Thellusson v. Woodford*. (4 Ves. 227.) It seems to be entirely settled, that the profits of an estate may lawfully, under a will, be made to accumulate, for the reasonable period allowed for an executory devise to vest. In the last case referred to, the learned Judges who were called in to assist the Lord Chancellor, seemed to agree, that an accumulation till the contingency happens, may be given to the executory devisee, who was to take the thing from whence the accumulation was to arise; and that a tendency to perpetuity was not increased by giving the intermediate profits with the subject which produces them. The value of the thing devised was enlarged, but not the time. The words of Lord Rosslyn, in that case, are deserving of notice, as they admit, that the land may descend to the heir in the intermediate period, without his being entitled to the rents and profits. "The Court," he observes, "has never considered it as an essential condition affecting the validity of the devise, that the rents and profits should attend the estate during the time it is to go down, before the absolute property is given." And, indeed, the difficulty raised by the counsel for the defendant, is not to be met with, as a suggestion, in any case in which the subject has been discussed, nor has it been assumed any where, that some person, other than the heir, must be vested

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with the legal estate, to enable the testator to give the profits along with the estate, contingently, to the executory devisee. The testator's intention is the only subject of inquiry, and when it is sufficiently ascertained, it must prevail, and be carried into effect; and the Court would never suffer that intention to be defeated, for the want of a mere formal trustee of those profits. Whoever takes the land during the intermediate period, either as heir or devisee, takes it subject to the trust created by the will. Suppose the will had expressly declared, that the real estate was given to the son on his attaining the age of twenty-three, and that the intermediate profits of the estate were given to him on the like event, could there be any doubt in such a case, whether the lawful purpose of the testator was to prevail? To deny it would be to deny him the power, which seems to be every where admitted, of creating a valid executory devise of the profits of the estate. And if the intention of the testator can as well be ascertained by the words which have been used, the same conclusion must follow; and I am not able to perceive, that there is any solid foundation for the objection.

It is further urged, that the heir ought to have been a party; but when it does not appear from the case, whether the testator left any lawful heir capable of inheriting; and considering that no heir has ever appeared to claim the inheritance, and that the defendant's testator took possession of the estate, and received the rents and profits as the executor of *A. H.*, or as guardian for his son, I am not disposed to listen to this objection.

I shall, accordingly, decree, that the defendant account for the rents and profits of the real estate mentioned in the pleadings, with interest after one year from each period, and, also, that she generally account for the property received by her testator, as executor and guardian, subject to all just allowances; and I shall direct a reference accordingly, &c.

Decree accordingly.

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BOUCK AND MACOMB *against* WILBER.

This Court will correct a *mistake* of an *extra judicial* nature, in an award of arbitrators, and decree a performance of it *in specie*.

As, where there was a dispute between the plaintiff and defendant, as to fifty acres of land, in the possession of the defendant, and the parties agreed to submit the matter to arbitrators, who were to appraise the value of the land, and the defendant was to pay the amount of the appraisement to the plaintiff, who was to execute a release of the land to the defendant; and the arbitrators, in their award, having appraised the fifty acres in the possession of the defendant, through a mere clerical mistake and inadvertence, in describing the land, stated the bounds erroneously, so as to include about one acre only, of the land in the defendant's possession: *Decreed*, that the award be corrected according to the truth of the fact, and a specific performance thereof accordingly.

THE bill, filed August 4, 1819, stated, among other things, that the plaintiffs were owners of several lots of land in *Lawyer and Gimmer's Patent*, in *Schoharie* county, and among the rest, of fifty acres, part of lot No. 1, in the first allotment of the patent. That, in 1811, an action of ejectment was brought by the plaintiffs against the defendant, who was in possession of the fifty acres. That when the suit was ready for trial at the circuit, the defendant, and others, on the 22d of *Septembur*, 1813, entered into an agreement, by which the legal title of the plaintiffs to the land was admitted: and it was agreed, between the parties, that *Archibald Crowell*, *John Adams*, and *Jabez D. Hammond*, or any two of them, should appraise in writing, on or before the 10th of *June* next, the sum which the defendant, and others, should, under all the circumstances, pay to the plaintiffs for the lots so occupied, and for costs; and the appraisers were authorized to decide on equitable as well as

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legal principles; and the sums so ascertained were to be paid in four annual instalments, secured by bond and mortgage on the land. And the plaintiffs agreed, on their part, in consideration of the sums so ascertained and secured to be paid, to convey the lots to the defendant and the others. That the arbitrators, after hearing the parties and their proofs, on the 19th of *May*, 1814, made their award under their hands and seals, by which they appraised the sum which the defendant was to pay for the fifty acres in his possession, at 337 dollars and 50 cents, and for the costs of the ejectment, 68 dollars and 68 cents, making, together, 406 dollars and 18 cents. That the arbitrators, in describing the fifty acres possessed by the defendant, *by mere mistake*, and inadvertence, gave an erroneous description of the boundaries. That the plaintiffs being always ready to perform the award on their part, on the 30th of *June*, 1819, executed a deed of conveyance of the fifty acres, to the defendant, and tendered the same to the defendant, on the 17th of *July*, and demanded payment of the sum so awarded; but the defendant refused to pay the money, and receive the deed, and still continues in possession of the land, and has received the rents and profits. *Prayer*, that the defendant should be decreed to pay to the plaintiffs the 406 dollars and 18 cents, with interest and costs, &c., and for general relief.

The answer of the defendant denied that the plaintiffs were owners of the fifty acres, and averred that he had the legal title to the land. That he entered into the agreement as to the submission, merely to avoid further litigation. He admitted the award as set forth; that in regard to the defendant, it includes only one acre, and twenty-two rods, of lot No. 2, in the great subdivision of lot No. 1; and that No. 2 is the one owned and possessed by him. He admitted that the arbitrators might have appraised lot No. 2, it being occupied and claimed by the defendant, and had, through mistake, and misapprehension, give a wrong description of it, yet he

did not know it to be so, though he had some reason to believe it. But, if that was the appraisal and intention of the arbitrators; they ought to have inserted the true boundaries in their award. He admitted the tender of a deed, &c., and a refusal, on his part. He stated, that the plaintiffs brought an action at law against the defendant, on the award, to recover the amount, that the defendant pleaded the mistake, &c., and a verdict was found for the defendant, on which judgment was given in *May*, 1819. That the sum at which the fifty acres were appraised was no more than the fair value; and that he refused to comply with the award, because it was illegal and void.

Witnesses were examined on both sides, and the cause was brought to a hearing on the pleadings and proofs.

H. Hamilton and *H. Bouck*, for the plaintiffs. They cited 2 *Vernon*, 24. *Kyd on Awards*, 332. 334. 1 *Atk.* 63. 3 *Atk.* 494. 529. 644. 3 *P. Wms.* 186. 5 *Ves.* 346. 1 *Johns. Ch. Rep.* 101. 2 *Johns. Ch. Rep.* 276.

S. A. Foot, contra, cited 16 *Johns. Rep.* 227. 1 *Madd. Ch. Pr.* 65. 6 *Ves.* 34.

THE CHANCELLOR. It appears very clearly from the answer and the proofs, that the arbitrators did appraise and determine according to the articles of submission, the sum which the defendant, under all the circumstances of the case, ought to pay for the fifty acres of land which he occupied and claimed. They inadvertently made a mistake in setting out in the award a description of the land; and the description takes in adjoining land, with only a small part of the fifty acres. The mistake is too palpable to be denied, but it was a mistake only of a clerical nature in drawing up the award. The judgment of the arbitrators was truly exercised and passed upon the object of the submission; and the appraisal is admitted to have been just and fair when ap-

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plied to the defendant's land. There can be no doubt, therefore, that the defendant is bound, in good faith, and in conscience, to fulfil the award on his part, according to the judgment and manifest intent of the arbitrators; and the mistake in the description of the boundaries of the land ought to be corrected according to the truth of the case, and the intention of the parties concerned. Had the arbitrators appraised a different tract of land, instead of the fifty acres possessed by the defendant, there would have been good ground for rejecting the award as *dehors* the submission. But here the determination was upon the very matter in dispute, and the judgment of the arbitrators is not questioned. The plaintiffs are only seeking the benefit of that judgment, and to be relieved from a plain mistake which impedes it. They are certainly entitled to relief upon the plainest principles of justice; and they can obtain it consistently with the general doctrine of the Court, and the language of all the cases.

In *Norton v. Mascall*, (2 Vern. 24.) an award was made not binding, as the case says, by form of law. Each party had a duty to perform under it. The one was to pay and execute a release, and the other to assign securities. And though "the award was *extra judicial*, and not good, in strictness of law, yet the Lord Chancellor decreed it should be performed in *specie*." It seemed to be well understood in many of the cases referred to in *Underhill v. Van Cortlandt*, (2 Johns. Ch. Rep. 339.) that such mistakes of an extra judicial nature, and not bearing upon the judgment of the arbitrators, were to be corrected. It was assumed in that case, and in *Shepard v. Merrill*, (2 Johns. Ch. Rep. 296.) that a mistake in a matter of fact attending an award, could be relieved; and though the decree in the former case has been since reversed by the Court of Errors,^(a) it was,

(a) Vide 17 Johns. Rep. 406—436.

as I understood, on the ground of misconduct in the arbitrators or the party, and I believe I may venture to conclude that the whole law of that case remains sound and unshaken.

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I shall, accordingly, declare, that the plaintiffs are entitled to the benefit of the award, according to the assessment of the arbitrators, and that the erroneous description of the premises shall be deemed to be corrected according to the truth of the fact. The decree must, accordingly, be entered, that the defendant, within thirty days, and on an offer of the deed tendered in *July* last, or of another of like import, duly executed, pay to the plaintiffs the sum of 406 dollars and 18 cents, awarded, with interest, from the day of the tender of the deed, and costs of the suit to be taxed.

Decree accordingly.

W. & D. SEYMOUR *against* J. SEYMOUR and others.

A *surrogate* has concurrent jurisdiction with this Court, to compel administrators to account, and make distribution of the estate.

And where *administrators* have been brought before the *surrogate* who granted the letters of administration, for an account and distribution of the intestate's personal estate, this Court will not, without some special and satisfactory reason, interfere with the proceedings of the surrogate, by granting an injunction, and sustaining a bill for general relief.

A bill for *discovery*, in aid of the cause before the *surrogate*, must charge certain facts within the knowledge of the defendant, the disclosure of which is material and necessary to the party's defence in that Court, and that he has no means of showing the facts, without such discovery.

But *it seems*, that where the bill is for discovery merely, and no injunction is asked for, and there is a demurrer to the bill, the Court will not examine so nicely as to the materiality of the discovery.

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THE bill stated, that the plaintiffs were administrators of the goods and chattels of *Stephen Seymour*, deceased, and that the defendants, claiming distributive shares of the estate, had applied to the *surrogate* of *Ulster* county, from whom they received letters of administration, and sued out a citation to the plaintiffs to appear before him, on a given day, and account for the personal estate in their hands to be administered; that they had appeared and offered to account according to the inventory, but that the defendants had insisted, that they should account, not only for the personal estate inventoried, but for personal property given and delivered by the intestate to the plaintiffs, shortly before his death, and in contemplation of death, and which the plaintiffs claimed as a gift, &c. That the proceedings were postponed by the *surrogate*, until the second day of *June*. That the plaintiffs "were apprehensive that they should not be able to make full proof of the material facts," requisite to protect the property so delivered to them, without a disclosure from the defendants. The bill *prayed* for an injunction to stay further proceedings before the *surrogate*, and that the plaintiffs be permitted to settle their account as administrators before this Court, as to all the persons who claim distributive shares. The bill, also, prayed process of subpoena, &c.

P. Ruggles, on behalf of the plaintiffs, moved for the injunction, according to the prayer of the bill.

THE CHANCELLOR. The object of this bill, is not simply discovery, but relief. It seeks to transfer to this Court the jurisdiction of the whole matter of account between the administrators and the next of kin; and that too after the cognisance of the case has duly attached before the *surrogate*. It is not to be disputed, that the *surrogate* is clothed with powers competent to settle the accounts of the estate,

and to decree and enforce distribution; and there is no reason assigned why his jurisdiction should be superseded, and the entire cognisance of the case transferred to this Court. The act relative to the Court of Probates, &c. (1 N. R. L. 448. s. 11, 12, 13.) declares, "that it shall be lawful for the surrogate granting administration, to call such administrators to account, &c. and upon hearing, and due consideration, to order distribution, &c., and the same distribution to decree and settle, and to compel such administrators to observe and pay the same, and to enforce such decree by imprisonment, &c., and to compel witnesses to attend and be sworn," &c. The surrogate has so far a concurrent jurisdiction with this Court; and without some special reason set forth in the bill, I am not inclined to interfere with the ordinary exercise of such a power; because, I do not, at present, perceive, that such an interference would be warranted. There is nothing, in this case, that would not apply to every case; and it would be assuming exclusive jurisdiction over the subject matter.

But if this be considered as a mere bill of discovery, in aid of the cause before the surrogate, it is essentially defective. There is not sufficient ground laid, for staying a trial at law, or a proceeding in another Court. The bill ought to have charged, that certain facts were within the knowledge of the defendants, and that a disclosure from them was requisite. The bill or affidavit to support the injunction, must state the belief of the plaintiff, that the answer would furnish discovery material to the defence, and that the plaintiff had not the means of obtaining the facts without such discovery. This was the doctrine of the case of *Gelston v. Hoyt*, (1 Johns. Ch. Rep. 543.) and it is supported by other decisions. (*Appleyard v. Seton*, 16 Ves. 223. *Duvals v. Ross*, 2 Munf. 290.) A general demurrer will lie to a bill, that seeks immaterial discovery; (8 Bro. P. C. 161.) and it is not material, unless it really be want-

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ed for the defence at law. In this case, the plaintiff is only *apprehensive* that he should not be able to make *full proof* of the material facts. This is too feeble an averment, a suggestion of too doubtful an import, and of too diffident a pretension, to justify an injunction staying a proceeding before a competent tribunal. Probably, if the question on the materiality of the discovery sought, had arisen upon a demurrer to the bill, and an injunction staying the suit at law in the mean time had not been asked for, the materiality of the discovery might not have been very nicely examined. Lord *Thurlow* said, in such a case, upon demurrer, (*Bishop of London v. Fytche*, 1 Bro. C. C. 69.) that "whether it was material or not, was chiefly for the plaintiff to judge, for he must pay the costs of the application. It would remain with another Court to say how far it was material."

Motion denied.

GRAY, *Executrix of GRAY*, against J. B. MURRAY.

After a hearing and final decree in a cause, a witness cannot be re-examined to explain or correct his testimony, taken on his examination in chief, and read at the hearing, unless, perhaps, under very special circumstances.

A voluntary *ex parte* affidavit of the witness, to explain and correct a mistake in his former testimony, cannot be read at a rehearing of the cause.

May 29th.

AT a rehearing of this cause,(a) before the Chancellor, at his chambers, by consent,

S. Jones, for the defendant, moved for leave to read as

(a) Vide, S. C. vol. 3. p. 167.

evidence, the deposition of *James B. Murray*, showing and correcting a mistake in his testimony, taken on his examination in chief, and read at the former hearing. The deposition was taken before a commissioner, on the 21st of June, 1819. He cited, in support of the motion, 1 *Johns. Ch. Rep.* 528. 2 *P. Wms.* 646. *Dickens*, 677. 2 *Madd. Ch. Pr.* 439. 10 *Ves.* 236.

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B. Robinson, contra.

THE CHANCELLOR. The deposition now offered to be read was not taken upon a re-examination before the examiner, nor founded upon a previous order, but is a voluntary *ex parte* affidavit, made at the suggestion of the defendant, a year and a half after the hearing and decree, and nearly six months after the coming in of the Master's report, consequent upon the final decree. The witness states, in his deposition, that the alleged mistake in his examination in chief, before the examiner, was not discovered until some time after the former hearing, and that *he was applied to by the defendant*. That, upon that application, he proceeded to review his deposition, and having investigated the matters therein stated, he became satisfied that his former deposition was inaccurate; and the deposition now offered explains the inaccuracy, and gives what he considers a correct statement of facts and circumstances, according to his recollection and belief. It strikes me that the admission of this deposition, as evidence in the cause, under all the circumstances, would be unprecedented and dangerous. An order of the Court ought to have preceded the taking of this deposition; and as the alleged error lay not in one or more particular and precise words, which might have been corrected in open Court, or before a master, the deposition or examination ought to have been taken in the regular way, before the examiner upon the settled interrogatories; or, at any rate, a cross exa-

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mination ought to have been afforded to the plaintiff. This was the course in *Kirk v. Kirk*; (13 Ves. 285.;) and before any such re-examination, there ought to have been an inquiry into the circumstances attending the alleged mistake, and, perhaps, it might have been necessary to have had the examiner, as well as the witness, examined, *ore tenus*, in Court. The existence of the mistake ought to have been made out previously, to the perfect satisfaction of the Chancellor, as a ground for the subsequent amendment and correction of the same testimony. It would be extremely hazardous, except in a very special case, to allow of such amendments, after the testimony has been heard, and critically discussed in court, and the bearing and effect of every part of it understood and judicially settled. It opens a door to fraud and perjury, by holding out, or encouraging inducements to supply insufficient evidence, or to withdraw or explain away that which has been oppressive. In this instance, the language of the testimony proposed to be altered is clear, distinct, and precise, and the mistake is discovered only upon the suggestions of the defendant, after the cause has been heard, and decided against him.

There are no cases that have permitted an interference with the testimony at such a late period, and under such an aspect of things.

In *Grielle v. Gansell*, (2 P. Wms. 648.) Lord King allowed a deposition to be amended after publication, and before hearing; but it appeared to the Court that the witness had made a mistake, and both the witness and the examiner had attended and been examined in Court, as to the fact of a mistake. So, in *Darling v. Staniford*, (*Dickens*, 358.) the witness was examined in Court by the Master of the Rolls, and he was satisfied of the mistake, and how it arose, before the witness was permitted to amend his deposition. Again, in *Rowland v. Ridley*, (1 Cox's Cases, 281.) a deposition of a witness was permitted to be amended upon a clear and material mistake, shown by his affidavit, and that

of another person; and Lord *Thurlow* observed, that "it was a matter of great delicacy, to alter a deposition after publication, and nothing could justify it but *the strongest conviction* of a mistake having been made." The cases are those in which the application has been made after publication, and before hearing; (see *Ingram v. Mitchell*, 5 *Ves.* 297. *Kirk v. Kirk*, 13 *Ves.* 285. Lord *Abergavenny v. Powell*, 1 *Merivale*, 130.) but in *Sandford's* case, (1 *Ves.* jun. 398.) a witness was examined after the decree, and it was merely because he had been inadvertently examined before, without a sufficient release, which did not cover a very small debt against him; and it is to be observed, that the application was not to correct a mistake in his testimony. It was only to retake the deposition, after he had been made competent by a better release. There never was a re-examination permitted, merely to alter and correct testimony, after the cause had been heard and discussed, and decided upon the very matters of fact to which that testimony referred. It would be setting a most alarming precedent, and would shake the fundamental principles of evidence in this Court.

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Motion denied.

J. R. LIVINGSTON *against* D. D. TOMPKINS.

A Court of Equity does not lend its aid to divest an estate, for the breach of a condition subsequent.

It does not assist the recovery of a penalty or forfeiture, or any thing in the nature of a forfeiture.

It will only interfere to protect the property from waste and destruction, or to prevent its removal out of the jurisdiction of the Court, pending an action at law to recover the possession.

Where the plaintiff having an exclusive right to navigate with *steam*

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boats, the waters of the bay of *New-York*, and that part of the *Hudson river*, south of the state prison, granted to the defendant the exclusive right of navigating steam boats between *New-York* and the *Quarantine Ground*, on *Staten Island*, &c. ; and it was provided, that if the state or legislature of *New-Jersey* should, at any time thereafter, obstruct or prevent the plaintiff from navigating with steam boats, the waters of that state, that, thenceforth, the grant should cease and be void : and on the application of *G.*, a citizen of *New-Jersey*, (against whom the plaintiff obtained an injunction out of this Court, to prevent his navigating the waters in this state, within the limits of the plaintiff's exclusive grant,) the legislature of that state passed an act, declaring, that if any citizen of that state should be restrained, by injunction or order from this Court, from navigating with steam boats, the waters between the ancient shores of *New-Jersey* and *New-York*, the plaintiff, in such injunction, not being an inhabitant of *New-Jersey*, should be answerable to the party aggrieved, in an action of trespass, and by writ of attachment ; and that the Court of Chancery might issue an injunction to restrain him from navigating the waters of that state with steam boats : and *G.* accordingly, under that act, obtained an injunction, which was served on the plaintiff, who was thereby prevented from navigating the waters of *New-Jersey* with his steam boat ; on a bill filed by the plaintiff against the defendant, on the ground of the grant to him being, therefore, void : Held, that though the *casus fœderis* may have occurred, yet this Court would not interfere to restrain the defendant from continuing to exercise his right under the grant to him, until the plaintiff had established the fact *at law*, and his right to resume the grant.

May 26th and
June 1st.

THE bill stated the different acts of the legislature, giving and securing to *R. R. Livingston* and *R. Fulton*, the right of navigating the waters of this state, with boats or vessels moved by steam or fire, &c. (Vide, ante, p. 48. 95. 150. 174.) That *R. R. L.* and *F.*, by deed, dated August 20th, 1808, granted to the plaintiff and his assigns, all their right under the laws of this state, "exclusively to navigate from any place in the city of *New-York*, lying to the south of the state prison, to the *Jersey shore* and *Staten Island*, to wit, to *Staten Island*, *Elizabeth-town Point*, *Perth* and *South Amboy*, and the *Raritan river*,

with steam boats," &c. That the plaintiff, at great expense, caused to be built a boat moved by steam, and to navigate within the limits of the said grant. That on the 8th of January, 1817, the plaintiff entered into an agreement with the defendant, and granted to him and his assigns, the exclusive right of navigating steam boats "from the city of *New-York* to the *Quarantine Ground*, and to any other point or place, within one mile's distance, on each side of the *Quarantine Ground*, excepting the place called the distillery wharf," during the residue of the term so granted to *R. R. L.* by the acts of the legislature. That the defendant covenanted that he would not, during the grant, without the previous consent in writing of the plaintiff, either navigate, or permit by grant, or consent that any other navigate, by steam boats, "upon any of the waters of the *Kills* (except within the mile aforesaid) of *Staten Island Sound*, *Amboy Bay*, *Middletown Point*, or the *Raritan River*, or to or from any place adjoining such waters, or to or from any part of *Staten Island*, except that part granted as aforesaid." That the defendant agreed to pay to the plaintiff, the sum of five thousand dollars, as a consideration for the grant. That it was further agreed between the plaintiff and defendant, "that in case the state or legislature of *New-Jersey* should, at any time thereafter, obstruct or prevent the plaintiff, or his assigns, in, or from, navigating steam boats within the waters of that state, then, and from thenceforth, the agreement, and every thing therein, to cease and be void." That on the 3d of May, 1819, a bill was filed by the plaintiff against *Aaron Ogden* and *Thomas Gibbons*, of *New-Jersey*, complaining of a violation by them of the said exclusive right of the plaintiff, and praying for an injunction to restrain them from so doing. That an injunction was, on that day, granted, restraining *Gibbons* from navigating, with steam boats, the waters in the bay of

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* *Vide, ante*
p. 48. 150.

New-York, or in the *Hudson* river, between *Staten Island* and *Powles Hook*.* That the injunction was served, and remained in full force. That the plaintiff had built a steam boat, called the *Olive Branch*, with which he continued to navigate under the right of the plaintiff, the waters of this state between the city of *New-York*, and the places mentioned in the said grant to the plaintiff, and not included in the agreement with the defendant. That on the 20th of *February* last, upon the petition of *Thomas Gibbons*, the legislature of *New-Jersey* passed an act, by which it was enacted, that if any citizen of that state should thereafter be enjoined, or restrained, by any injunction of the Court of Chancery of *New-York*, from navigating with any steam boat belonging to him, in whole or in part, the waters between the ancient shores of the states of *New-Jersey* and *New-York*, the plaintiff, in such writ of injunction, shall be liable to the person aggrieved for all damages, to be recovered, with triple costs, in an action of trespass, &c. or by a writ of attachment, in case such plaintiff, in any such order of the Court of Chancery of *New-York*, be a non-resident of *New-Jersey*; and that it should be lawful for the Court of Chancery of *New-Jersey*, on a bill by an inhabitant of that state, to enjoin, by writ of injunction, the plaintiff in any such writ or order of the Court of Chancery of *New-York*, or any person claiming under him, from navigating with steam boats the waters within the jurisdiction of that state, and from transporting passengers to and from *New-York*, or *Staten Island*, to *New-Jersey*.(a) That

(a) The act is as follows: "*A further supplement to the act, entitled, an act to preserve and support the jurisdiction of this state.*"

"1. *Be it enacted, by the council and general assembly of this state, and it is hereby enacted by authority of the same, That every plaintiff in any proceeding, judgment, or decree, which shall be had, passed, or rendered, in pursuance of any process served or executed within the state of New-Jersey, contrary to the provisions of the act, entitled, an act to preserve and support the jurisdiction of this state, passed December 3d, 1807, shall be liable to all damages, expenses, and charges, to be recovered with triple costs, in an*

since the passing of that act, *Gibbons*, on the 6th of *May*, filed a bill in the Court of Chancery of *New-Jersey*, against the plaintiff, praying for an injunction, by virtue of the said

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action of trespass, or trespass upon the case, to be brought by the parties aggrieved or injured, in the Supreme Court, or any other Court of this state having cognisance thereof; or by writ of attachment, in case the plaintiff in any such proceeding, judgment, or decree, shall not be resident in this state.

" 2. *And be it enacted*, That in case any person or persons shall, under colour of any law of the state of *New-York*, seize, or take into possession, any boat or vessel whatever, moved by steam or fire, belonging, or to belong, in part or in whole, to a citizen or citizens of *New-Jersey*, for being employed or used in navigating any of the waters between the ancient shores of the states of *New-Jersey* and *New-York*, without a license first had and obtained of the person or persons entitled to, or claiming to be entitled to, an exclusive right or privilege to navigate the waters of the state of *New-York*, (under a law of that state,) with boats or vessels moved by steam or fire, the person or persons so seizing or taking possession of any such boat or vessel as aforesaid, belonging, or to belong, in part or in whole, to a citizen or citizens of the state of *New-Jersey* as aforesaid, shall be liable to the person or persons aggrieved or injured thereby, for all damages, expenses, and charges sustained by occasion thereof, to be recovered with triple costs, in an action of trespass, or trespass upon the case, to be brought in the Supreme Court, or any other Court having cognisance of the same, or by a writ of attachment in case the person or persons making such seizure, or taking possession as aforesaid, under or by virtue of a law of the state of *New-York*, shall not be resident in this state.

" 3. *And be it enacted*, That if any citizen of the state of *New-Jersey* shall hereafter be enjoined or restrained by any writ of injunction or order of the Court of Chancery of the state of *New-York*, by virtue, or under colour of any act of the legislature of that state, from navigating with any boat or vessel moved by steam or fire, belonging, or to belong, in part or in whole, to him, the waters between the ancient shores of the states of *New-Jersey* and *New-York*, the plaintiff or plaintiffs, in such writ or order, shall be liable to the person or persons aggrieved, for all damages, expenses, and charges occasioned thereby, to be recovered with triple costs, in an action of trespass, or trespass upon the case, in any Court having cognisance thereof, or by a writ of attachment in case the plaintiff or plaintiffs in any such writ or order of the Court of Chancery of the state of *New-York*, shall not be resident in the state of *New-Jersey*.

" 4. *And be it enacted*, That it shall and may be lawful for the Court of Chancery of the state of *New-Jersey*, on a bill of complaint filed by any citizen or inhabitant of this state for that purpose, to enjoin or restrain by a

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act, against the plaintiff, because of the injunction heretofore granted by this Court, at the instance of the plaintiff, against G., and because the plaintiff had caused G. to be

writ of injunction, the plaintiff or plaintiffs, in any such writ or order of the Court of Chancery of the state of *New-York*, or any person or persons claiming a right derived from or under such plaintiff or plaintiffs to navigate any of the said waters, from navigating with any boat or vessel moved by steam or fire, the waters within the jurisdiction of this state, and from bringing or transporting any passenger or passengers to and from the city of *New-York*, or from *Staten Island*, into the state of *New-Jersey*, whether such transportation be effected directly or circuitously, or by means of one or more boats of any description, or by shifting from one boat to another at any intermediate point between the city of *New-York* and *Staten Island*, and the shores of *New-Jersey* : *Provided*, said passenger or passengers shall be conveyed part of the way from *New-York* in any boat propelled by steam or fire ; that then, and in such case, it shall be the duty of the Chancellor to enjoin and restrain all and every person or persons whatsoever, from aiding or assisting in any such transportation of passengers, during the continuance in force of any such writ or order of the Court of Chancery of the state of *New-York*.

" 5. *And be it enacted*, That in case the party aggrieved shall proceed by virtue of this act, by writ of attachment, the proceedings shall be in like manner, as near as may be, as is directed by the act, entitled, an act for the relief of creditors against absconding and absent debtors, passed the 8th of *March*, 1798, against an absconding debtor, excepting, that instead of the oath or affirmation required by the said act, the applicant for such writ of attachment shall, before the sealing thereof, make oath or affirmation, which shall be filed in the office of the clerk of the Court out of which the attachment shall be issued, before any judge or justice of the peace in this state, that the person or persons against whose estate the attachment is to be issued, is not, to his knowledge or belief, resident at that time in this state, and of the nature of the injury sustained.

" 6. *And be it enacted*, That it shall and may be lawful for the governor, or person administering the government of this state, to cause to be enforced and effectuated the just rights of the state, according to all the provisions contained in the act, entitled, an act to preserve and support the jurisdiction of this state, passed *December 3d*, 1807, to bring to a determination the jurisdictional rights of the state of *New-Jersey*, in and over all the territories and waters lying between the state of *New-Jersey* and the state of *New-York* : and for the more speedy determination of the same, to cause to be prosecuted or defended any suit or suits which may now, or hereafter shall exist, in which either or both of the questions, as to the rights of this state, may arise : *Provided*, the party in such suit or suits who may be interested in maintaining the rights of the state agree thereto.

restrained from navigating, with steam boats, the waters in the bay of *New-Jersey*, and in *Hudson* river between *Staten Island* and *Powles Hook*. That an injunction was accordingly issued by the Court of Chancery of *New-Jersey*, and served on the plaintiff, injoining him from navigating the waters of that state with steam boats, and from bringing passengers from the city of *New-York*, or *Staten-Island*, to *New-Jersey*. That *G.*, under that act, had caused the steam boat of the plaintiff to be *attached* and detained at *New-Brunswick*, to answer for damages alleged to arise from the injunction so issued by this Court. That the plaintiff, by reason thereof, is prevented from navigating steam-boats within the waters of *New-Jersey*; and that, consequently, by the terms of the agreement between the plaintiff and defendant, the grant to the defendant has ceased and become void. That the defendant, notwithstanding, continues to carry passengers in his steam-boat *Nautilus*, to and from *New-York* and *Staten-Island*, in the same manner as if that agreement remained in full force. That the defendant and *Gibbons* carry passengers in the steam boats *Nautilus* and *Bellona*, to and from *New-York* and *New-Brunswick*, in the following manner: *Gibbons* transports passengers from *New-Brunswick*, through the *Kill* and *Sound* between *New-Jer-*

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"7. And be it enacted, That it shall and may be lawful for the governor of this state to call to his assistance for advice and consultation in any of the proceedings on this or other acts in force on the subject aforesaid, the attorney general, or a privy council, or both, at the expense of this state, and he or they, or any of them, together with him, are hereby authorized and empowered to do all things concerning the same, which, in their discretion may, by him, or with any of them, be deemed to be to the best interest of this state, to bring to a determination or final adjustment all differences between the two states, by the appointment of commissioners, defending or prosecuting of suit or suits, or otherwise; and any report of commissioners appointed shall become binding on this state and the state of *New-York*, when confirmed by the respective legislatures thereof: *Provided always*, that nothing in this act contained, shall be so construed as to have any operation against any patent right or privilege obtained under the constitution or laws of the *United States*."

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sey and *Staten-Island*, to a wharf on *Staten-Island*, below the mouth of the *Kills*, and in the bay of *New-York*, as the plaintiff believes, and there lands them, to be taken on board the *Nautilus*, and carried to *New-York*. That the defendant causes the *Nautilus* to touch at such wharf on *Staten-Island*, below the mouth of the *Kills*, and to take on board such passengers for *New-York*, so that the whole passage, from *N. B.* to *N. Y.* is, by means of this concert and contrivance, completed. That passengers are, in like manner, carried from *N. Y.* to *N. B.* That the wharf or dock below the mouth of the *Kills*, is not the ordinary landing place, where the *Nautilus* lands her passengers, going to and from *Staten-Island*, but is about a mile therefrom, and the defendant causes his boat to go out of her usual and direct route, in order to touch at the said wharf at the mouth of the *Kills*. That the running of the said boats, in this manner, is one continued navigation between *N. B.* and *N. Y.* and is a direct contravention of the exclusive right of the plaintiff, in the same manner as if such navigation was made wholly in one of the said boats; and *G.* does, indirectly, under the cover of the steam boat *Nautilus*, what he cannot do directly with his own boat. That, by the joint operations of the *Nautilus* and *Bellona*, they are engaged in the very business exclusively belonging to the plaintiff, and the same is a violation of the injunction granted by this Court against *Gibbons*. The plaintiff prayed for an injunction to restrain the defendant from navigating with the *Nautilus*, or any other steam boat, within the limits granted by *R. R. Livingston* and *Fulton*, to the plaintiff, and from transporting passengers between *New-York* and *Staten Island*, or to and from any point south of the state prison, and from shifting passengers, as above stated, with the *Bellona*; and for general relief, and that the defendant may answer under oath to all and singular the premises, &c.

On filing the bill, the Chancellor ordered that eight days

notice be given to the defendant of the motion for an injunction.

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Notice, accordingly, having been given, *Van Vechten* and *T. Sedgwick*, now moved for an injunction, pursuant to the prayer of the bill.

Henry, contra, read the following affidavits and documents: (1.) The affidavit of the defendant: (2.) *Articles of agreement* between the executors of *R. Fulton* and the executors and devisees of *R. R. Livingston*, of the one part, and the defendant, *Adam Brown*, since deceased, and *Noah Brown*, of the other part: (3.) The agreement, dated the 8th of *January*, 1817, between the plaintiff and defendant: (4.) *Affidavit* of *Benjamin Simonson*: (5.) *Copy of the act* of the legislature of *New Jersey*, of *February* last: (6.) The grant of *R. R. L.* and *R. F.* to the plaintiff in *August*, 1808: (7.) *The declaration and plea* in suits at law, commenced in the *Marine Court* in the city of *New-York*, since the passing of the act of the legislature of *New Jersey*, against *John De-forest*, the captain, and *Peter Quinn*, the engineer of the defendant's steam boat *Nautilus*, for maliciously impeding the plaintiff, in the enjoyment of his exclusive right, &c. The defendant, in his affidavit, stated, that no replication had been put in to the plea in those suits, nor any trial had; and that another suit at law had been commenced by the plaintiff against the defendant in the Supreme Court, to try the same question as arises on the bill subsequently filed in this Court, and that no declaration had been filed in that cause.

For the plaintiff, it was contended, that there was no adequate remedy but by an injunction; for the injury to the plaintiff would be irreparable. The counsel cited 6 *Ves.* 149. 1 *Vern.* 130. 1 *Ves.* 476. 5 *Ves.* 555. *Amb.* 209. 2 *Wooddes.* 417. note. 16 *Ves.* 173. 18 *Ves.* 72.

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For the defendant, it was said, that this was, in effect, a motion for a *forfeiture*, in consequence of an act wholly extrinsic, and over which the defendant had no control. There was no act, agency, or default, to be imputed to the defendant. The question arose under a patent right claimed by the defendant, and those with whom he was associated, over which this Court had no jurisdiction. (9 *Johns. Rep.* 239. 7 *Johns. Rep.* 144.) The *proviso* in the grant from the plaintiff to the defendant, was applicable only to a *total destruction* of the plaintiff's right. It was the act of the plaintiff himself, in procuring the injunction against *Gibbons*, that caused the act of the legislature of *New-Jersey* to be passed, so that the plaintiff seeks to avail himself of a forfeiture produced by his own act. There should be a decree in the Court of Chancery, in *New-Jersey*, before this Court can interfere. If the law of this Court does not work a *forfeiture*, there can be no ground for the motion. Equity never decides on a legal forfeiture. It is for a Court of law, to determine as to the forfeiture, or whether the grant has become void. A Court of Equity neither tries the question of forfeiture, nor enforces it. But equity will, always, relieve against a forfeiture, if compensation can be made. (2 *Johns. Ch. Rep.* 526.) The effect of this motion is to produce a *forfeiture*. If the plaintiff prevails, the defendant will lose his steam boat, and the 5,000 dollars paid to the plaintiff, the amount paid by him to *R. R. L. and F.*, and *A. and N. Brown*, and the expense of the *Turnpike road, Ferry, Wharves, Hotels, &c.*, or the whole establishment at *Staten-Island*, connected with his steam boat. This would be a most enormous injury to the defendant; it would be, in truth, a monstrous forfeiture. Suppose the legislature of *New-Jersey*, should repeal the act to-morrow, could the defendant re-assume his grant? No. On the principle contended for by the plaintiff, the defendant's grant is forfeited and gone forever. It would be the highest injustice, to grant an injunction which goes to exact a forfeiture, and to extinguish a right

Besides, all the persons associated with the defendant in his great and expensive establishment on *Staten-Island*, ought to have been made parties; for their interests will be deeply affected, if the injunction is issued. The cases which have been cited are those in which the right was clear, and the mischief irreparable, and where public policy was concerned. This case is directly the reverse. (1 *Vern.* 175. 275.) Suppose an injunction should be awarded, and, afterwards, dissolved, what remedy would the defendant have for the damages which he must suffer, in the mean time? The right of the plaintiff ought to be clear and manifest, either from the record of the judgment of a Court, or from the concession of the defendant. There ought to be a defence, and a final judgment, in the Court of *New-Jersey*, before the plaintiff can apply here. Besides, the act of the Legislature of *New-Jersey*, affects only one of the *remedies* of the plaintiff, not to the *right* itself. The plaintiff is not, and cannot be, prejudiced by the defendant's going to the new *wharf*, which he has purchased of *Lawrence*; for the plaintiff cannot go there.

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THE CHANCELLOR. The injunction is moved for on the ground that the grant from the plaintiff to the defendant, has ceased, and become void, and that the defendant is now navigating the steam boat *Nautilus* without license, and in violation of the exclusive right vested in the plaintiff, as assignee of *Livingston* and *Fulton*.

June 1st.

Two questions present themselves upon this motion :

1st. Has the right or privilege heretofore granted to the defendant ceased, in consequence of the matters charged in the bill ?

2dly. If so, then is the remedy sought upon this motion proper for the case, as appearing in the bill, and in the affidavits and documents read on the part of the defendant ?

1. In the articles of agreement between the parties, there
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was a condition or proviso in these words: "Provided always, and it is hereby declared and agreed, by and between the parties to these presents, that in case the state or legislature of *New-Jersey* shall, at any time hereafter, obstruct or prevent the said *John R. Livingston*, his executors, administrators or assigns, in or from navigating boats or vessels, propelled by the force or agency of steam, within the waters of that state, then and from thenceforth, this agreement, and every thing herein contained, shall cease and be utterly void." The question is, has the plaintiff been obstructed or prevented, within the meaning of this covenant or condition? According to the language used in *Lord Cromwell's* case, (2 Co. 70.) this is a condition, by force of the proviso, and a covenant, also, by force of the other words.

The act of the legislature of *New-Jersey* referred to in the bill, (and of which a copy at large is annexed to the defendant's affidavit,) declares, in the 3d section, that if any citizen of *New-Jersey* shall be restrained by injunction or order from this Court, by virtue of, or under colour of, any statute of this state, from navigating with steam boats "the waters between the ancient shores of the states of *New-Jersey* and *New-York*," the plaintiff in such injunction not being a resident of *New-Jersey*, shall be answerable in damages to the party aggrieved, by an action of trespass, and by writ of attachment.

This section of the act of *New-Jersey* does not reach the case of the proviso in the agreement, for the plaintiff is not obstructed or prevented by it from navigating the waters of *New-Jersey*. He is only made liable to an action in that state for using a remedy provided by the laws of this state, for a violation of his right; and the same observation applies to the second section.

But the 4th section of the *New-Jersey* act, makes it lawful for the Court of Chancery of that state, on a bill filed by any inhabitant of it, to restrain the plaintiff in any such

order of this Court, from navigating, with steam boats, the waters within the jurisdiction of that state.

The plaintiff is brought within the operation of this provision, as appears from the facts charged in the bill.

On the 3d day of *May* last, (as it is stated,) a bill was filed in this Court by the plaintiff, against *Aaron Ogden* and *Thomas Gibbons*, of the state of *New-Jersey*, complaining of a violation of his exclusive right to navigate steam boats on the waters of this state south of the *New-York* state prison, and praying for an injunction to restrain them, and, on the same day, an injunction was granted restraining *Gibbons* from navigating, by steam boats, the waters in the bay of *New-York*, and in *Hudson's* river, between *Staten-Island* and *Powles Hook*, and the injunction was served, and continues in full force. The bill further states, that under the act of *New-Jersey*, *Thomas W. Gibbons* (in pursuance of whose petition the act of the Legislature of *New-Jersey* was passed,) had filed a bill in the Court of Chancery of that state, against the plaintiff, praying for an injunction to restrain him from navigating with any steam boat, the waters within the jurisdiction of that state, because of the injunction heretofore granted by this Court against *Gibbons*, and that an injunction had, accordingly, been granted, in pursuance of the provisions of the said act, and served upon the plaintiff; and his steam boat, called *the Olive Branch*, had, also, been attached and detained at *New-Brunswick*, at the suit of *Gibbons*, under the said act, and for the cause aforesaid.

The deduction in the bill from these facts, is, that the plaintiff has been obstructed and prevented, within the purview of the agreement, from navigating steam boats within the waters of *New-Jersey*, and, consequently, that the case has occurred in which his grant to the defendant has become utterly void.

I am rather inclined to think, that this question is a legal one, and properly cognisable in a Court of law. The affida-

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vit of the defendant states, that the plaintiff has already commenced an action in the Supreme Court, to try the question; and I ought not to interfere with it any further than the consideration of it may arise incidentally, in the discussion of the motion for this intermediate and auxiliary process of injunction.

If it appeared clearly, that there was no obstruction within the meaning of the agreement, there would, then, be no pretence for the motion, and I should at once be relieved from the necessity of examining any other point in the case. But I cannot deal so summarily with the subject, for it appears that there is colour, at least, for the conclusion drawn by the bill.

The agreement referred to the existence of a fact, whether such an obstruction did exist, and, probably, without reference to the validity of the statute creating such obstruction, and without reference to any final decision in the Courts of *New-Jersey*, on the provisions of the statute, after the matter had been fairly and fully litigated. The parties seem to have contemplated the possible existence of such an extraordinary act as the one which has been passed, and they made provision for the event, by making the condition of the grant to depend upon the operation of the act, in actually obstructing or preventing the navigation of the plaintiff. The agreement supposed the case of an act to be passed, without the volition or fraud of the plaintiff, and without the default or agency of the defendant; and when the obstruction of the plaintiff exists under the authority of such a statute, and is founded on grounds apparently indefinite as to time, the *casus fœderis* would seem to have occurred.

The act of the plaintiff, in suing out a writ of injunction under the laws of this state, in protection of his exclusive right over certain of its waters, does not, as was suggested by the counsel for the defendant, impair his rights, under the proviso in his agreement with the defendant, notwith-

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standing that act is made the ground of the proceeding in *New-Jersey*. What the plaintiff did, was the lawful exercise of a right, and it cannot impair or affect his remedy under the agreement. His rights and remedies in this state were derived from a series of laws giving to *Livingston* and *Fulton*, for a limited time, the exclusive right of navigating steam boats upon the waters of this state. It is well known, that this navigation, so auspiciously commenced under the patronage of the legislature, on the waters of the *Hudson*, in 1807, has since rapidly extended itself over all the principal waters of the *United States*, and imparted honour and happiness to our common country. These state laws, upon which the plaintiff's rights were founded, were passed with liberal and patriotic views, and without the smallest intention or apprehension of violating the private rights of any individual, or the public rights of any community. They had nothing to do with the question of territorial boundary between this state and *New-Jersey*. The exclusive privilege was expressly limited to "the waters of this state, or within the jurisdiction thereof;" and when this Court was called on to protect that privilege, by injunction, according to the directions of those laws, it was bound to regard, as waters within the jurisdiction of this state, "the whole of the river *Hudson*, southward of the northern boundary of the city of *New-York*, and the whole of the bay between *Staten Island* and *Long Island*;" because, the Legislature had declared those waters to be within its jurisdiction, and that such jurisdiction had been "hitherto actually and constantly exercised or possessed" by this state, and that it was to be "preserved, maintained, and defended by all lawful ways and means, until this state shall be evicted thereof by due course of law."

If the jurisdiction of this state over the waters of *Hudson* river, and of *York Bay*, be not well asserted, the error is in the Legislature, and not in the plaintiff, nor in the Courts of justice. And as this state is in the actual and constant exer-

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cise of exclusive jurisdiction, there is a remedy for the trespass or the usurpation, (if it be one,) which is obvious, effectual, specific, and just. The Supreme Court of the *United States* has original jurisdiction in all controversies between two or more states; and this state, as she intimates in her statute, is ready to abandon her jurisdiction over those waters, whenever she shall be evicted by due course of law.

I cannot but be of opinion, that this constitutional mode of redress, through the organ of the Supreme Court of the *United States*, would have been quite as wise and equitable, as the punishment of an innocent individual, for having protected his right under the laws of his own state, by means of the Courts of justice of his own state; or as the restraining of "all and every person," from aiding in the transportation of passengers into *New-Jersey*, in boats "of any description," provided such passengers have been conveyed "part of the way" by means of the steam boat of such individual.

Citizens of each state, are entitled to free ingress and regress to and from any other state, and to all the immunities of citizens in every state.

The Supreme Court of the *United States* having sole and exclusive jurisdiction over all differences between states, all acts of reprisal between the states, are unnecessary and unlawful.

I had, hitherto, understood and believed, that the citizens of each state were entitled, under the constitution of the nation, to free ingress and regress to and from any other state, and were entitled to all immunities of citizens in every state; that the government of the *United States* had sole and exclusive jurisdiction over all disputes and differences between two or more states, concerning boundary, jurisdiction, or other cause; and that the law of reprisals permitted, in extreme cases, by the law of nations, between independent states, was in this country, and under our union, as between the several states, entirely unnecessary, as well as absolutely unlawful.

These observations have been made to meet the objection of the defendant's counsel, that the act of the plaintiff was the procuring cause of the law of *New-Jersey*, and that he was now seeking to avail himself of the consequences of his own act. I shall, certainly, not visit that law upon him, nor permit it to impair, in the smallest degree, the remedies he may be entitled to in this Court. Nor is the constitutionality of

the act of *New-Jersey*, a proper subject of discussion here. That question belongs, in the first instance, to the Courts of that state, and ultimately to the Supreme Court of the *United States*; and I entertain a confidence that the question, if ever raised, will be temperately discussed, and justly decided, in each of those jurisdictions.

2. But even if we were to assume that the defendant's privilege has ceased, by reason of the act of *New-Jersey*, the next question is, whether this Court ought to interfere and restrain the defendant from the further exercise of the privilege of which he is still in the enjoyment, until the right of the plaintiff, to resume his grant, has been established at law.

It appears to be contrary to the uniform course of the Court, and to its established principles, to *aid* in the devastation of an estate, for breach of a condition subsequent. The cases are full of discussions how far this Court can *relieve* against subsequent conditions; and the general rule formerly was, that if the Court could make compensation to the party in damages, for non-performance of the condition, it would then relieve. (*Popham v. Bampffield*, 1 *Vern.* 79.) That relief seems now to be confined to cases where the forfeiture has been the effect of accident, and the injury is capable of compensation. (*Rolfe v. Harris*, 2 *Price Exch. Rep.* 207. note. *Brucebridge v. Buckley*, 2 *Price*, 200.) It may be laid down as a fundamental doctrine of the Court, that equity does not assist the recovery of a penalty or forfeiture, or any thing in the nature of a forfeiture. In the present case, there is no act done, or omitted to be done, by the defendant, which occasions the loss of his privilege. By the act and agreement of the parties, it has been made to depend upon an event, over which the defendant had no control. But the event, perhaps, equally occasions the loss of the right, as if it had been expressly forfeited by the act of the party. It is in the nature of a forfeiture, and produces the same penal result;

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This Court does not lend its aid to devastate an estate, for the breach of a condition subsequent.

It does not assist the recovery of a penalty or forfeiture, or any thing in the nature of one.

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and so far from aiding the plaintiff to divest the defendant of his privilege, this Court could only interfere to protect the property from waste, destruction, or removal out of the jurisdiction of the Court, pending the action at law to recover possession. There is no sort of analogy between this case and that of *Livingston v. Van Ingen*, decided on appeal, in 1812. (9 *Johns. Rep.* 507.) The appellant, in that case, was, and had been, for some years, in possession of the statute privilege, and the opposition boats were a trespass upon his right, without colour of title. In the present instance, the defendant has been, for some years, in the lawful possession under his grant; and to suspend the exercise of that right, (and which would be equivalent to an ouster of possession,) before the question of failure of his grant, upon a condition subsequent, has been legally tried, would be as severe as it would be unprecedented.

A defendant is not bound to answer, so as to subject himself to a penalty or forfeiture.

There are numerous cases establishing the rule that no one is bound to answer so as to subject himself, either directly or eventually, to a forfeiture or penalty, or any thing in the nature of a forfeiture or penalty. (*Smith v. Read*, 1 *Atk.* 528. *Harrison v. Southcote*, 1 *Atk.* 528. *Bird v. Hardwicke*, 1 *Vern.* 110. *Sharp v. Carter*, 3 *P. Wms.* 375. *Wrottesley v. Bendish*, 3 *P. Wms.* 236. *Chancey v. Fenhoulet*, 2 *Ves.* 265. *Boteler v. Allington*, 3 *Atk.* 453. *Monnins v. Monnins*, 2 *Ch. Rep.* 36. *Chauncey v. Tahourden*, 2 *Atk.* 392. *Fane v. Ailee*, 1 *Eq. Cas. Abr.* 77. pl. 16. *Lord Uxbridge v. Staveland*, 1 *Ves.* 56.) It is said, that there is a difference between a determination of the estate by the party himself, and by statute; but in several of the cases the determination was to arise from the act of the party, as, for instance, a re-marriage, and yet a demurrer to the bill was allowed. So, it has been said, that there was a difference between a limitation over of the estate, on a certain event, and a condition working a forfeiture; but the distinction does not seem to be supported. The great prin-

ple is, that equity "will not assist in the recovery of a penalty or forfeiture, when the plaintiff may proceed at law to recover it." It will only stay a party from making waste, until it be seen whether he has any right to do so. This was said by Lord Ch. B. *Comyns*, in *Jones v Meredith*; (2 *Com. Rep.* 671.) and the rule has been again and again repeated. and is the common language of the books, that in no case, (unless under extraordinary circumstances,) will a forfeiture, or the divesting of an estate, be assisted in a Court of Equity. (3 *P. Wms.* 236. 1 *Vern.* 60. 1 *Eq. Cas. Abr.* p. 131. pl. 9. p. 77. pl. 16.)

The Court has sometimes restrained a party from the exercise of a right, in a particular manner, and contrary to an express covenant; but this was held to be in the nature of a specific performance, and was consistent with the ordinary and legitimate enjoyment of the subject. This was the case in *Barret v. Blagrove*; (5 *Ves.* 555. 6 *Ves.* 104.) but in none of the cases which I have looked into, do I find any assistance lent to a plaintiff to enable him to recover at law, property alleged to be divested upon the breach of a condition subsequent. I am persuaded there is no such case, and especially, if the condition be several in its nature, and partaking of the spirit and character, if it does not of the name of a penalty or forfeiture. In this case, considering the great and expensive establishments connected with the enjoyment of the defendant's privilege, an immediate restraint upon its enjoyment would be attended with very injurious consequences; and, I think, there was much discretion and good sense in the observation of the Lord Keeper, in *Hills v. University of Oxford*, (1 *Vern.* 275.) when he denied a similar motion for an injunction. He said, that "if the right should be found for the defendants, they would receive a prejudice by the injunction which he could not compensate."

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Motion denied.

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MYERS

v.

BRADFORD.

MYERS *against* BRADFORD and others.

There is no precise time for filing exceptions to the report of a Master on the insufficiency of an answer, as it does not require confirmation.

On filing the report, the plaintiff may immediately sue out a *subpœna*, for a better answer, and for costs; and if the defendant does not file exceptions to the report, and obtain an order for setting them down for hearing, within *eight* days from the service of the *subpœna*, the plaintiff may sue out an *attachment*; after which, the defendant cannot except to the report.

April 18th
and June 13th.

PETITION of the plaintiff, stating, that the defendant, B., put in his separate answer, the 24th of *December*, 1819, to the plaintiff's bill. That notice of exceptions to the answer was served on the agent of the plaintiff's solicitor, on the 14th of *January* last. Sixteen days having expired, and no notice of submitting to answer the exceptions being received, an order was entered on the 31st of *January*, referring the exceptions to a Master residing at *Poughkeepsie*, in *Dutchess* county. That I. Hooker, the Master, summoned the defendant (who lives in the city of *New-York*) to appear at the hearing, on the 11th of *February*, which summons was duly served on the defendant's solicitor, the 4th of *February*. That the defendant not appearing at the day appointed, the Master proceeded to hear the exceptions *ex parte*, and decided that they were well taken. This report was filed four days thereafter, and a *subpœna* for further answer served on the 22d of *February*. On the 6th of *March*, the defendants, on petition, obtained an order, that the defendants have *four* weeks, from the 3d of *March*, to except to the Master's report, instead of answering the exceptions, and that, in the mean time, the question of costs, upon the exceptions, be reserved. That this order

was obtained without notice, and was irregular. That being ignorant of the order of the 6th of *March*, the plaintiff, on petition, which was served on the defendant's solicitor, obtained an order, on the 20th of *March*, that the defendant pay the costs of the exceptions, and the proceedings subsequent, to compel a further answer; which order was taken, without any opposition, and the notice of taxation for the 31st of *March*, served. On the 25th of *March*, the plaintiff's solicitor first received a copy of the order of the 6th of *March*, which had not been served on his agent. That on the 30th of *March*, the defendant obtained another order, *ex parte*, without notice, enlarging the time for excepting to the report twelve days. The plaintiff prayed that the orders of the 3d and 20th of *March*, obtained by him, might be confirmed; and that the *ex parte* orders of the defendants, of the 6th and 30th of *March*, might be vacated, and that the defendants pay the costs of the application.

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After reading the affidavit of the defendants' solicitor, an order was entered, *April 18th*, 1820, ordering that the further consideration of the motion be postponed to the first day of the next term of this Court, "to the end, that the hearing of the exceptions to the Master's report may be brought on, and the same be considered in connection with this motion."

The questions arising on this order, were argued by *P. Ruggles*, for the plaintiff; and by

Griffin, for the defendants.

THE CHANCELLOR. The orders of the 6th and 30th of *March* last, were irregular, as they were obtained *ex parte*, without notice. The defendants were in default, (1.) In not appearing before the Master on the 11th of *February*; and, (2.) in not excepting to the Master's report prior to

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the 30th of *March*. The *English* practice appears to be, (*Hinde*, 272, 273. *Newland's Pr.* 175.) that with respect to exceptions to a report which does not require confirmation, as on the insufficiency of an answer, there is no precise time for filing them. Upon filing the report, the plaintiff may immediately sue out a subpoena for a better answer and for costs; and if the defendant does not file exceptions, and obtain an order for setting them down within eight days from the service of the subpoena, the plaintiff may sue out an attachment; after which the defendant cannot except to the report.

The exceptions to the report, assuming them to have been filed in season, were not well taken. The answers were not sufficiently precise and full, and did not meet and answer all the circumstances from whence a fraudulent combination was to be inferred. The exceptions to the report are, consequently, overruled, and the defendants must, within fourteen days, answer the exceptions to the answers which have been allowed by the Master, and pay the costs accruing to the plaintiff since filing the said exceptions, or that an attachment issue.

Order accordingly.

MILLER and others against BURROUGHS and others.

On a bond, conditioned to pay, with *interest* at *six* per cent., for the security of which a mortgage has been taken, the plaintiffs, after a forfeiture, are not entitled to *seven* per cent., the lawful interest. But interest is to be paid according to the contract, until it ceases to operate, by being merged in the decree.

June 22d.

IN the bond, for which the mortgage in this case was taken as security, the interest was expressed to be at six per

cent per annum. The day of payment having passed, the bond and mortgage became forfeited. The question was, whether the plaintiffs were not entitled to *seven* per cent. interest, being the lawful interest, from the time of the forfeiture.

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Riker, for the plaintiffs, cited 2 *Dess. Rep.* (*South Carolina*,) 170.

Per Curiam. Interest must be decreed according to the contract of the parties, until the contract ceases to operate, by being merged in the decree.

Six per cent. only, is, therefore, to be allowed up to the time of confirmation of the Master's report.

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Pleadings should consist of averments or allegations of facts, stated with as much brevity and precision as possible; not of inference or argument.

Impertinence in pleadings, consists in setting forth what is not necessary to be set forth, as stuffing them with recitals and long digressions as to matters of fact wholly immaterial.

Generally, the bill and answer ought not to set forth deeds in *hæc verba*; but so much of them only, as is material to the point in question; nor ought they to be argumentative or rhetorical.

EXCEPTIONS to the defendant's answer: 1. That the answer sets forth, in *hæc verba*, a copy of the power of attorney from the plaintiff to the defendant and *William Lang*, mentioned in the bill, though the defendant was not requested so to do, and though the substance of the power was fully stated in the bill, and when, by setting it forth in

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hæc verba, the sense and legal effect of it are not, in the least, qualified or varied from the same instrument as set forth in the bill.

2. Because, the defendant has, in his answer, from a part of the 17th page thereof, to a part of the 19th page thereof, beginning, &c. stated matters not necessary to answer any allegations in the bill, to which he is not interrogated, and upon which no pertinent interrogatories can be framed, or depositions given, and which are totally irrelevant, immaterial, and highly scandalous.

The exceptions having been referred to a Master, were allowed by him, and the defendant excepted to his report. And the question now came upon the exceptions to the report.

Caines, for the plaintiff, in support of the exceptions taken to the answer, cited *Coop. Eq. Pl.* 317, 318, 319. *Mif. Pl.* 257. 1 *Harris' Ch.* 88. 101, 102. 303.

H. W. Warner, contra.

THE CHANCELLOR. 1. It was not necessary to set forth the power of attorney in *hæc verba*, in the answer. The substance of it was accurately stated in the bill, and to give it at length in the answer, was impertinent. Impertinence consists (1 *Harr. Pr.* 101. 303.) in setting forth what is not necessary to be set forth, as where the pleadings are stuffed with long recitals, or with long digressions of matters of fact which are totally immaterial. An answer, or a bill, ought not, ordinarily, to set forth deeds in *hæc verba*; and if the pleader sets forth only so much thereof as is material to the point in question, it is sufficient. They are matter of evidence to be shown at large at the hearing. In *Alsager v. Johnson*, (4 *Ves.* 217.) a bill of costs was given at large in the schedule to the answer, when a reference to the bill of costs delivered would have fully an-

+ *Harrison's Ch. Pr.*

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swered the purpose, and it was deemed impertinent. The present case is not an instance of gross abuse of this rule of pleading; but I am glad to see the exception taken, and the point brought up, for the opportunity it affords of laying down the rule. I have frequently perceived the pleadings, and particularly the bill, incumbered with a recital, in *hæc verba*, of deeds, mortgages, and other documents, which, unless checked, will lead to great oppression of the suitor, and to the reproach of the Court. Whenever a proper case arises, I shall certainly mark it with animadversion; and shall endeavour to enforce, by all suitable means, precision and brevity in pleading. The objection to unnecessary *folia*, may be taken on the taxation of costs.

The ancient rules and orders of the *English Court of Chancery*, are very explicit, and powerfully monitory on this subject.

If any pleading should be found of an immoderate length, Lord Bacon declared, that both the party and the counsel under whose hand it passed, should be fined. And Lord Keeper Coventry, with the advice of Sir Julius Caesar, the Master of the Rolls, in 1635, ordained, that bills, answers, &c. "should not be stuffed with the repetitions of deeds or writings in *hæc verba*, but the effect and substance of so much of them only as was pertinent and material to be set down, and that in brief and effectual terms, &c., and upon any default therein, the party and counsel under whose hand it passed, should pay the charge of the copy, and be further punished as the case should merit."

The same rule was, afterwards, adopted, or re-enacted, by the Lords Commissioners in 1649, and in Lord Clarendon's *Digest or System of Rules*, (*Beame's Orders*, 25. 69. 165.)

But we have a domestic precedent on this point, which is too interesting to be unnoticed.

In 1727, Governor Burnet, of the colony of *New-York*, exercising, in council, the powers of a Court of Chancery,

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appointed five of the most distinguished counsel of the Court, as a committee, "to consider and report on the fees and dilatory proceedings in the Court of Chancery, as true and great grievances." This committee, consisting of *Archibald Kennedy, Rip Van Dam, Cadwallader Colden, James Alexander, and Abraham Van Horn*, reported to the council a number of abuses in the practice of the Court of Chancery, and the remedy. This report, which is inserted at the end of *Bradford's* edition of the *Colony Laws*, is a curious and instructive document; but my concern, at present, is only with what is termed the first abuse and remedy. It declares, "as an abuse, the inserting, at too much length, in bills, matters of inducement only. Thus, if *A.* has been entitled to the thing in question, who conveyed it to *B.*, who conveyed it to *C.*, who conveyed it to the plaintiff; after the thing is ~~certainly~~ set forth in *A.*, it is enough to say, he conveyed it to *B.*, and ~~he~~ to *C.*, and he to the plaintiff, as by the deeds ready to be produced, will appear." No counsel, say they, ought to set their hands to any bill that is unduly long, and if he does, he ought to pay all the charges arising from such needless length.

The exception to the Master's Report, allowing this first exception, is overruled.

2. The same objection applies to the matter forming the ground of the second exception. It was matter argumentative, rhetorical, irrelative, and, consequently, impertinent. Pleadings should consist of averments, or allegations of fact, and not of inference and argument.

The exception to the report is, also, overruled; and as the fault of the pleader was of a venial character, I am content that the costs of the exceptions, in this particular case, should abide the event of the suit.

Order accordingly.

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BROWER

V.

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BROWER *against* FISHER.

The prosecutor of a charge of *lunacy*, is not, of course, ordered to pay *costs*, where the party is found, by the inquisition, to be of sound mind, if the prosecution has been in good faith, and upon probable grounds.

A person deaf and dumb from his nativity, is not, therefore, an idiot, or *non compos mentis*; though such, perhaps, may be the legal presumption, until his mental capacity is proved, on an inquiry and examination for that purpose.

IN *March*, 1810, the plaintiff purchased of the defendant his right or share in his father's real and personal estate, which was subject to debts and incumbrances, for 375 dollars. On receiving a deed of conveyance from the defendant, the plaintiff gave him a note for the consideration money, payable in *May*, 1811. The plaintiff being, afterwards, indebted to the defendant in the sum of about seventy dollars, he gave a bond to the defendant for the amount of the note and that debt, making 479 dollars. The bill stated that the defendant, at the time of the purchase, was of lawful age. That he was born deaf and dumb, and had continued so from his nativity, but had sufficient intelligence to communicate his ideas, by signs, to those who were intimate with him, so as to make himself well understood. That the defendant, at the time of the purchase, was assisted by his mother and by *W. Barker*, a friend of the defendant, and that the price agreed to be paid was a full and fair consideration for his interest, under the circumstances. That the plaintiff was, at the time, advised that no valid legal objection could be made to the transaction. That the defendant has since brought an action at law against the plaintiff on the bond, and recovered a judgment for 666 dollars and 16 cents, the principal and interest due on the bond, which the plaintiff

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was willing to pay into Court, or in any way the Court might direct, as the plaintiff, having been advised that the deed of conveyance from the defendant to him was not valid, for want of legal capacity in the defendant to contract, did not feel safe in paying the money to the defendant; believing that if the title should prove defective, he should be without redress against the defendant, who had become intemperate, and was wasting his property. That an execution had been taken out on the judgment, &c.

An injunction was issued to stay the execution, according to the prayer of the bill. The defendant answered the bill, admitting the facts and allegations it contained.

On the *petition* of the plaintiff, a *commission of lunacy* was issued, to inquire whether the defendant was *compos mentis* or not; and by the inquisition returned, it was found that the defendant was born deaf and dumb, and had continued so from his nativity; but that, notwithstanding, he had sufficient intelligence for the management of himself and his property, and was capable of communicating, by signs and motions, with persons with whom he was intimate, so as to be well understood, and of understanding them; that the jurors were of opinion that the defendant was not a lunatic, unless the fact of his having been born *deaf and dumb*, in judgment of law, made him a lunatic, and that the defendant conveyed all his title and interest in his father's estate, to the plaintiff, for 375 dollars, which was a fair consideration for the same.

On filing the inquisition, the injunction was dissolved, and the plaintiff paid the amount of the judgment, with costs. The cause was now set down for hearing on the bill and answer, no testimony having been taken by either party; and the only question was, whether the bill was to be dismissed, with or without costs.

A. McDonald, for the plaintiff.

J. Smith, for the defendant.

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THE CHANCELLOR. The sole question in this case is, whether the bill shall be dismissed with or without costs. The plaintiff claims no relief after the inquisition which has been returned.

Upon the finding of the jury under the commission, in nature of a writ *de lunatico inquirendo*, I refused to appoint a committee, and adjudged that the defendant was not to be deemed an idiot from the mere circumstance of being born deaf and dumb. This is a clear settled rule, and numerous instances have occurred in which such afflicted persons have demonstrably shown, that they were intelligent, and capable of intellectual and moral cultivation.

In *Elliot's* case, (*Carter's Rep.* 53.) *Bridgman*, Ch. J. and the other judges of the C. B. admitted a woman born deaf and dumb, to levy a fine, after due examination of her. He mentioned, also, the case of one *Hill*, who was born deaf and dumb, and who was examined by Judge *Warburton*, and found intelligent, and admitted to levy a fine. So Lord *Hardwicke*, in *Dickenson v. Blisset*, (*Dick. Rep.* 268.) admitted a person born deaf and dumb, upon being examined by him after she came of age, to take possession of her real estate.

Notwithstanding these authorities, the bill does not appear to have been filed vexatiously, but rather to obtain, for greater caution, the opinion of the Court on a point which had been left quite doubtful in many of the books, and which had never received any discussion here. It is stated, in *Bracton*, (*De Exceptionibus*, lib. 5. ch. 20.) to be a good exception taken by the tenant: *Si persona petentis fuerit surdus et mutus naturaliter, hoc est, nativitate*; for it is said, *acquirere non potest, et per officium judicis invenienda sunt ei necessaria quoad vixerit*; and he takes it for granted, that such a person is placed under a *curator*, and that he must sue

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in assise, *sicut minor*. So, it is said, in *Brooke*, (*Eschete*, pl. 4.) that *videtur qui surdus et mutus ne poet faire alienation*; and the distinction taken was, (*Dy. 56. a. note 13.*) that if deaf and dumb from his birth, he was *non compos*, but not if so by casualty. (a) By the civil law, it was also generally understood and laid down, that a person born deaf and dumb was incapable of making a will, and he was deemed a fit subject for a curator, or guardian. (*Inst. 1. 23. 24.* and *Ferniere*, h. t. and *Inst. 2. 12. 3.* and *Ferrier and Vinnius*, h. t.) Perhaps, after all, the presumption, in the first instance, is, that every such person is incompetent. It is a reasonable presumption, in order to insure protection, and prevent fraud, and is founded on the notorious fact, that the want of hearing and speech exceedingly cramps the powers, and limits the range of the mind. The failure of the organs requisite for general intercourse and communion with mankind, oppresses the understanding; *affigat humo divinæ particulam auræ*. A special examination, to repel the inference of mental imbecility, seems always to have been required; and this presumption was all that was intended by the civil law, according to the construction of the Ecclesiastical Courts; for a person born deaf and dumb was allowed to make a will, if it appeared, upon sufficient proof, that he had the requisite understanding and desire. (*Swinb. part 2. s. 10.*)

I am satisfied that the plaintiff is justly to be exempted from the charge of a groundless and vexatious inquiry, and the course is not to punish the prosecutor of a charge of

(a) The author of *Fleta*, (lib. 6. c. 40.) supposes a person born deaf or dumb, to be incapable of enfeoffing, &c.: "Competit etiam exceptio tenenti propter defectum naturæ potentis, vel si naturaliter a nativitate *surdus* fuerit aut mutus, tales enim adquirere non poterunt, nec alienare, quia non consentire, quod non est de tarde mutis vel surdis, quibus dandi sunt curatores et tutores, &c. But Coke (*Co Litt 42. b.*) says, a man deafe, dumb, or blind, so that he hath understanding and sound memory; albeit, he expresse his intention by signs, may infeoffe," &c., though a man deaf, dumb and blind, from his nativity, cannot.

lunacy with costs, if the prosecution has been conducted in good faith, and upon probable grounds. (1 *Collinson on Lunacy*, 461. 464.) I shall, therefore, dismiss the bill without costs.

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Decree accordingly.

W. S. SMITH *against* SMITH and others.

When the securities held by a *trustee*, are directed by a decree confirming a Master's report, to be assigned to the *cestui que trust*, the responsibility of the trustee ceases; and there having been no culpable negligence or default on his part in taking them, he is not to be charged with them, on making a final decree, on the equity reserved, though they may have been, perhaps, impaired by the delay of the litigation between the parties.

If a decretal order of reference is silent as to the mode of calculating interest, and the Master does not allow *annual rests*, the plaintiff should apply, on the coming in of the report, for an order on the Master to report his reasons for rejecting the claim; or make the rejection a ground of *exception* to the report. If he does neither, and the report is confirmed, he cannot, on a final hearing, on the *equity reserved*, make the objection to the report.

In a suit brought by a *cestui que trust*, against his trustees, for an account, &c., no costs were allowed the plaintiff, the conduct of the defendants being fair and honest, and the allegations of misconduct unfounded.

THIS cause came on to be heard, upon the equity reserved, in the decree overruling the exceptions to the Master's report. (*Vide, ante*, S. C. p. 281.) The points now raised and argued, are sufficiently stated in the opinion delivered by the Court.

June 27th.

T. A. Emmet and D. B. Ogden, for the plaintiff.

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THE CHANCELLOR. This cause coming on to be heard upon the equity reserved, the plaintiff contends,

1. That provision ought to be made in the decree for the indemnity of the plaintiff, in case any of the notes charged by the Master to the plaintiff, and credited to the defendants, should prove to be bad.

It is to be observed, that an exception was taken to the report by reason of that charge and allowance, and the same was overruled on the 8th day of *January* last. According to the doctrine of that decision, the guardian was entitled to be credited for the notes which he had ready to deliver, inasmuch as the notes were of comparatively small amount, and were taken according to the course of dealing in that part of the country, and the testator's habits of business; and especially as the makers of the notes were originally safe and responsible persons, and continued to be so to the time of taking the account by the Master. Under such circumstances, it was not deemed proper that the trouble and risk of collection of the notes should be thrown upon the guardian. It would seem, then, that this point is, in a considerable, if not in an essential degree, a repetition of the former exception. If this point be well raised, then the risk of collection of the notes is placed upon the guardian; and that was not intended when the exception was overruled; I only went so far as to say, that if any well grounded distrust had been excited by the testimony, as to the safety of the debts, or any of them, I should have held the guardian responsible.

It is now upwards of two years and an half since this suit was commenced, and upon all the material grounds of litigation, the plaintiff has failed, and the guardian has vindicated himself. It may be, that the security of some of the notes has been impaired by the delay arising from this litigation; and it would be more reasonable, that the loss,

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(if any there be,) should be borne by the plaintiff, who, as it appears to me, has rather unkindly, and without due cause, carried on this sharp litigation, than by the guardian, who has successfully resisted the more injurious part of the allegations. When the securities taken by a trustee, are directed to be assigned over to the *cestui que trust*, I apprehend his responsibility ceases; and that there is no precedent of an order or decree continuing it, after he has been directed to part with the securities, and when he has not been convicted of any culpable negligence or default in taking them. There is no middle course to be pursued. The notes ought to be absolutely charged or credited to the defendant; and I have already decided, when the exception was before me, that he was entitled to assign them. Though the learned counsel for the plaintiff appear to be dissatisfied with the former decision on this point, I can only say, that this is not the proper time and mode to question it; nor have I been able, after a diligent consideration of the case, to partake of their dissatisfaction. I shall, therefore, not make any provision in the decree to continue the defendant's responsibility.

2. The next point raised on the part of the plaintiff, is, that he is entitled to interest on the balances that remained, from year to year, in the hands of the guardian.

The Master, under the decretal order of the 7th of *October*, 1818, was directed to take and state an account touching the trust of the guardian, and the moneys received and disbursed, and "the balance which on such account should be found due from either party to the other." It appears from the Master's report, that in taking the account, the plaintiff claimed that a balance should be struck every year, on the 1st day of *March*, and that the defendants should be charged with interest on the balance so found in their hands, and that the claim was overruled. The ground on which the claim was disallowed by the Master, does not appear in the report, and the plaintiff offered to show upon

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the argument, *by affidavit*, that the Master overruled the claim, because the decretal order was silent on that point. The more regular way would have been, upon the coming in of the report, to have applied for an order upon the Master to have reported his reasons for rejecting that claim of interest; and so I once said in *Consequa v. Fanning*, on a like point. (3 *Johas. Ch. Rep.* 366.) The plaintiff did apply to the Court, and obtained an order, on the 13th of *September*, 1819, calling on the Master to report the testimony taken before him, in respect to certain other points in the cause. And the plaintiff might have made the rejection of that claim by the Master one of his exceptions on the return of the report. I am inclined to think the question of interest was placed before the Master, by the general terms of the order of reference, and that the construction put upon that order by the plaintiff, when he advanced that claim before the Master, was correct. Here, then, is a clear waiver of this objection to the report, by not making it in due time and order. The further directions, if any, were, by the order of reference, to be called for and made "on the coming in of the report." There was no such objection raised, but other objections were taken to the report, and a call made upon the Master upon other points; and now, when the discussions upon the report have ceased, and the report has been confirmed, and when the cause has been brought to a final hearing upon the equity reserved in the decree of the 8th of *January* last, and which appears to have been confined to the question of costs, this objection, as to the disallowance of interest, is raised. I am satisfied the objection is out of season, and that the good sense and convenience of the thing dictate this conclusion. The objection goes to open the report, after it has been regularly, and in the usual order and course of practice, confirmed; and it goes to open it on a point actually raised before the Master, and not noticed when the report was made up, nor when exceptions were taken to other parts of it. Whether

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the guardians ought to have been charged with interest upon fluctuating balances, that might have been, from time to time, in their hands, is a complicated question, that would require the re-investigation of the merits of the case, and of the accounts, and one which comes very unfitly before the Court, for the first time, in this stage of the cause. The equity of such a claim rests very much on the exercise of sound discretion, and depends on the character of the trust, the nature of the duties, the amount in hand, and the general conduct of the parties. Without giving any decided opinion on a point not properly before me, I may be permitted to say, from my knowledge of the cause, and the nature of the discussions which have taken place, that I am not very favourably impressed with the necessity or apparent justice of the claim.

3. The last point in the case, is the question of costs; and I have no hesitation to say, at once, that it would be unreasonable and oppressive, to charge the defendants with costs, when their conduct has been fair and honest, and the allegations of misconduct unfounded. The most that I can do, (and it is not without some hesitation and difficulty that I have brought my mind to acquiesce in it,) is to exempt the fund belonging to the plaintiff from the burden of a litigation which he has commenced and conducted with a temper not very becoming, towards the guardians of his youth, and the friends of his father.

The decree will, accordingly, be, that the defendant, within forty days from the service of a copy of this decree, assign over and deliver to the plaintiff, or to his solicitor, the notes in the pleadings and report mentioned as being taken and held in trust for the plaintiff, and, also, pay over to him as aforesaid, the balance of 861 dollars 3 cents, with interest, or 709 dollars 45 cents, being part thereof, from the 8th of *November*, 1815, and with interest on 151 dollars 58 cents, the residue thereof, from the 1st day of *March*, 1817;

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and that the assignment and delivery be made under the direction of one of the Masters of this Court, if the solicitors or counsel of the parties cannot otherwise agree as to the form and manner of the assignment, and that no costs of this suit be charged by either party as against the other.

Decree accordingly.

BAYARD and others *against* HOFFMAN and others.

A voluntary settlement, either of lands or chattels, by a person indebted at the time, is void as against creditors.

Whether the statute of frauds, (13 *Eliz.* c. 5. 1 *N. R. L.* 75. 19 sess. c. 44.) applies to a settlement of that kind of property which could not be reached by legal process, if no settlement had been made, such as *chose in action*, *money in the funds*, *stock* ? &c. *Quære.*

An assignment by a debtor of "all his estate, real and personal, and of all books, vouchers, and securities, relative thereto," in *trust*, for the benefit of all his creditors, passes all his estate and interest, equitable as well as legal, and his rights in action, or as *cestui que trust*, and, therefore, includes *stock* of the *United States*, before voluntarily assigned, when the debtor was insolvent, in trust for the benefit of his wife and children; and the trustees under the voluntary settlement, were decreed to hold the stock subject to the order and disposition of the trustees of the creditors under the general assignment.

July 5th.

WILLIAM OGDEN, one of the firm of *Murray & Ogden*, purchased public stock of the *United States*, to the amount of 11,979 dollars and 22 cents, with his own monies, derived from his wife's estate. The house of *M. & O.* were utterly insolvent, when the purchase was made, and the interest of the stock was pledged to *Mrs. Murray*, his wife's mother, for life, and the stock was placed under her control,

the better to secure the payment of that interest. Afterwards, on the 10th of *May*, 1817, the stock was voluntarily, or without any valuable consideration, assigned by *Ogden*, so far as respected his reversionary interest, to the defendants, *Martin Hoffman* and *William Creighton*, in trust, for the benefit of his wife and infant children. The motive of this assignment was not impeached, as it was then supposed, that the estate of *M. & O.* would be adequate to the payment of their debts. On the 28th of *January*, 1818, *M. & O.* proposed to make a general assignment of their property, upon trust, for the payment of their debts, and in the inventory of the property to be assigned and exhibited to their creditors, the above mentioned stock, subject to the life estate of *Mrs. M.*, who was aged, was included, and the settlement, by *O.*, of the reversionary interest on his wife and children was not disclosed, or known to the creditors, as it was supposed the voluntary settlement would not be valid against that subsequent assignment. The general assignment was, accordingly, made on that day, to the plaintiffs, *William Bayard* and *Henry Barclay*, in trust, for themselves and the other creditors. The two defendants, who are assignees for the benefit of the wife and children, refused to recognise the title to the reversion of the stock claimed by the trustees for the creditors; and they and the guardian *ad litem*, for the children, submitted to the direction of the court, and claimed to hold under the prior assignment.

There was no actual fraud suggested in the pleadings, and it was contended, on the part of the plaintiffs:

1. That the voluntary assignment of the stock, while *Ogden* was indebted and insolvent, was void in law:
2. That the plaintiffs, *B. and B.*, are to be considered as *bona fide* purchasers, without notice of the trust created by the previous voluntary assignment, and that the voluntary settlement is void, as against them.

The defendants insisted that the stock, as a *chose in action*, is not subject to process at law, nor to the debts of credi-

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tors, and that the voluntary settlement of it, is not within the statute of frauds.

T. L. Ogden, for the plaintiffs, cited 1 *Johns. Ch. Rep.* 261. 3 *Johns. Ch. Rep.* 481.

D. B. Ogden, for the defendants, cited 2 *Atk.* 600. 1 *Ves. jun.*, 198. 9 *Ves.* 189. 10 *Ves.* 368. *Atherley on Marriage Settlements*, 220, 221.

THE CHANCELLOR. The only difficulty in this case, arises from the nature or quality of the property contained in the settlement. It is the declared rule of the Court, (*Reade v. Livingston*, 3 *Johns. Ch. Rep.* 481.) that a voluntary settlement by a person indebted at the time, is void, as against antecedent creditors; I consider the principle as equally applying, whether the property consists of lands or chattels; and that the creditor may follow the property into the hands of the volunteer. This is admitted to be the general rule, but, as an exception, it is stated, (*Atherley on Marriage Settlements*, 220, 221. *Roberts on Fraudulent Conveyances*, 421, 422.) that the statute of 13 *Eliz.* does not extend to voluntary settlements of property which a creditor could not reach by legal process, in case no settlement had been made, such as *choses in action*, money in the funds, &c., and, therefore, a voluntary settlement of *that species of property*, must be good against creditors, even if made by an insolvent debtor. The settlement, it is said, cannot be injurious to the creditor, nor within the purview of the statute, since, if the settlement was set aside, the property could not be touched by the creditor, as no process of execution in law or equity can reach it. The statute of 13 *Eliz.* did not enlarge the jurisdiction of any Court, by furnishing new remedies. It only avoided the voluntary transfer, as against creditors, and left them to pursue the

property in the ordinary course under the existing remedies.

There is much plausibility in this reasoning, yet I should be sorry to find it to be the settled doctrine of the Court. It seems to be too encouraging to fraudulent alienations; and a debtor, under the shelter of it, might convert all his property into stock, and settle it upon his family, in defiance of his creditors, and to the utter subversion of justice.

If we look into the adjudged cases on this point, it will at once be perceived, that there is a great contrariety between those decided in the time of Lord *Hardwicke*, and his immediate successor, and those arising since. The subject is worthy of examination; and even if the doctrine of the latter cases is to prevail, I apprehend that the settlement in the present case may be questioned, and the stock appropriated to the use of the creditors, without interfering with any of the opinions.

The case of *Taylor v. Jones*, (2 *Atk.* 600.) decided by *Fortescue*, the Master of the Rolls, in 1743, contains the great and leading doctrine in support of the creditor. A bill was filed to have the debts of the plaintiff paid out of stock comprised in a voluntary settlement, and vested in trustees for the benefit of the defendant, for life, of his wife for life, and then for the benefit of his children. The money so vested was a legacy left to the husband after marriage. The settlement was made in 1734; and in 1741, the defendant gave warrants of attorney to confess judgments, and there was a letter of license given to the husband, but by agreement, it was not to prevent the creditors from proceeding against his effects. The Master of the Rolls held the settlement fraudulent and void, under the 13 *Eliz.* as to creditors, both before and after the marriage; and he decreed the trust estate (the stock) to be sold and applied to the payment of the creditors.

This decision appears to be so reasonable and just, that I

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should be very much inclined to follow it, if it has not been directly and absolutely overruled.

In *King v. Dupine*, (cited in the note to *Taylor and Jones*, and decided in 1744,) Lord *Hardwicke* went further, and in an ordinary case, where there was no fraudulent settlement in the way, aided the execution at law, so as to enable it to touch stock, to satisfy creditors. The defendant was entitled to the reversion of four exchequer annuities, which were vested in trustees, and of which he was only a *cestui que trust* in reversion. The plaintiff had obtained judgment at law, and the sheriff under a *fi. fa.* had seized the reversion of those four annuities, and made an assignment of them to *W.*, in trust for the plaintiff. But the proper officer refusing to register the judgment and assignment, the plaintiff filed her bill, and the point was, whether the sheriff could seize the reversion of these annuities, and assign them. Lord *Hardwicke* decreed, that the trustees and *W.* should assign their reversionary interest and estate in the annuities to the plaintiff, and that the requisite entries should be made at the exchequer, to entitle the plaintiff to the benefit of the reversion.

This last case does not appear to have been known to Lord *Thurlow*, or Lord *Eldon*, for it is not alluded to in any of their discussions; yet Mr. *Sanders*, the editor of *Atkins*, cites the register books for the decree.

Indeed, this power in the Court to aid the creditor at law, in his execution against property not ordinarily within its reach, seems to have been the received and unquestioned doctrine in the time of Lord *Hardwicke*.

Thus, in *Horn v. Horn*, (*Amb.* 79.) a bill was filed to aid an execution at law, by subjecting stock belonging to the defendant, and standing in the name of trustees, to the payment of the debt. The bill was dismissed *without costs*, because the plaintiff had, pending the suit, taken the defendant's person on execution at law. The Lord Chancellor evidently assumed the right and propriety of granting the

relief sought for, "of extending the power of the Court to reach what the common law could not," had not that circumstance intervened; and the reporter adds, in a note, that if the plaintiff had not taken out a *ca. sa.* the bill to subject the stock in the hands of trustees had been proper.

Lord Keeper *Northington*, in *Partridge v. Gopp*, (*Amb.* 596. 1 *Eden*. 163.) went a step further, and reached even money in the hands of the donee. An insolvent executor had given 500 pounds to each of his two children, and after argument, and much consideration, the gift of the money was declared fraudulent within the 13th of *Eliz.*, and liable to be refunded. He declared the doctrine to be, that no man had such a power over his own property, as to be able to dispose of it, so as to defeat creditors, unless for consideration. That the statute extended to all cases, unless the alienation was *bona fide*, and made upon good consideration; and that blood was held not to be a good consideration within that statute. That the validity of the alienation depended on the motive of the giver, and not on the knowledge of the receiver. That every man ought to be just before he is generous; and volunteers were responsible under the statute, to the creditors of the giver, though not to the giver himself. He concluded, that *if the defendants had stood in the capacity of donees only, the gift would have been void, and they must have refunded, at the peril of their liberty, if the money had been spent*; but as they were legatees, as well as donees, they had a right to retain in part of their legacies.

Here is a succession of three solemn adjudications, (without noticing the case of *Horn v. Horn*,) which establish, that property not tangible by *fi. fa.*, at law, will be reached by this Court, and that too, whether such property does or does not rest upon a voluntary settlement, fraudulent and void under the statute of *Elizabeth*. It may now be pertinently asked, when and where have these decisions been overruled? I have not discovered any thing weightier than a *dictum* or doubt of Lord *Thurlow*, repeated in subsequent cases.

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In *Dundas v. Dutens*, (1 *Ves. jun.*, 196. 2 *Cox*, 235.) the bill, among other things, prayed that certain stock settled upon the wife might be sold, and the proceeds applied to satisfy the creditors, and Lord *Thurlow* asked, if there was any case where a man having stock in his own name, has been sued for the purpose of having it applied to satisfy creditors. If the Court was of opinion that there was any lien upon the stock, by reason of the letter of license, in the case in *Atkyns*, by which it was capable of being affected, there might be foundation for it, but if not, it was quite new to him that Chancery could touch the stock; and he said, that "whenever it became necessary to consider the question what equity the plaintiff had against the fund or stock, he should hesitate sometime before he followed the cases of *Taylor v. Jones*, and *Horn v. Horn*."

It may be here observed, that the Master of the Rolls, in *Taylor v. Jones*, did not go, as Lord *Thurlow* intimates, upon the ground of an existing lien upon the stock. "The great question was," he said, "if this deed be fraudulent? For, if it is, whether the creditors have any specific lien, is not material."

In *Caillaud v. Estwick*, (1 *Anst.* 381.) a bill was filed to assist a judgment creditor of Lord *Abingdon*, who had assigned his life estate in a lease subsequent to the creation of the debt, in trust, to receive the rents and profits, and pay a moiety to certain scheduled creditors, (of which the creditor in that case was not one,) and the other moiety, from time to time, to Lord *A.* for his own use and benefit. The Court of Exchequer, under the circumstances of that case, refused to assist the creditor in reaching the share reserved to Lord *A.* and held in trust for him. The Court seemed to agree with the counsel for the trustee, that property or stock in the funds, or in the hands of a trustee, which could not be taken on a *fi. fa.* at law, could not be taken by any process of equity to assist the execution, according to Lord *Thurlow's* doctrine, in *Dundas v. Dutens*. The Chief Baron,

said, he once applied, on behalf of the crown, to have the assistance of equity in aid of an *extent*, to get at stock in the funds, and it was refused.

In respect to this *Exchequer* case, it may be observed, that the question, whether the deed of assignment was fraudulent and void under the 13 *Eliz.*, had been decided in the K. B. in favour of the deed, as being neither fraudulent in fact, nor fraudulent in law, and the case is reported in 5 *Term Rep.* 420. But the judges of the K. B. intimated, that after the scheduled debts were satisfied, *equity would direct the surplus or moiety reserved to Lord A., to be applied towards satisfaction of the other creditors.* The bill in the *Exchequer* was an injunction bill, to stay a recovery in trespass by the trustee against the creditor, for seizing the trust property in the hands of the trustee; and, therefore, the question, whether equity would follow the intimation of the K. B., did not directly arise in that case. The opinion of the judges was evidently in favour of the equity power to reach such property; and Lord *Somers*, in *Lewkner v. Freeman*, (*Prec. in Ch.* 105.) sustained a bill for the surplus, in a similar case, in favour of a single judgment creditor. And, surely, a debtor cannot place his estate in trust, to receive the issues and profits to his own use, without any power in the creditor, by any process of law or equity, to reach it. I am not willing to admit such imperfection in the administration of justice.

We have repeated *dicta* (but nothing more) of Lord *Eldon*, (9 *Ves.* 189. 10 *Ves.* 368.) to the effect, that Chancery does not give execution against stock, *eo nomine*, upon which there is no *lien*; and that stock cannot be attached in the life of the party, according to the language of Lord *Thurlow*, in *Dundas v. Dutens*. He said, that Chancery had no jurisdiction to give execution in aid of the infirmity of the law; yet, that under the bankrupt law, stock is got at, and, also, in the administration of assets. The Master

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of the Rolls, in *Taylor v. Jones*, got at stock, through a doctrine which is very difficult to maintain, and which seems to have surprised Lord *Thurlow*. "If, therefore, the decision was to turn upon the latter doctrine, (meaning that in *Taylor v. Jones*,) I should wish," says he, "to look at those authorities."

The last case I shall notice in this series of judicial observations, and which are all to be traced up to the doubts of Lord *Thurlow*, is that of *McCarthy v. Goold*, (1 *Ball & B.* 387.) in which the plaintiff, under a decree for the payment of money, sought for an order upon sequestrators, to attach the dividends upon bank stock standing in the name of the defendant. But this part of the application was abandoned without argument, and Lord Ch. *Manners* observed, that it had been very properly abandoned, for he had listened very attentively to Lord *Thurlow*, in *Dundas v. Dutens*, and he was clearly of opinion, that *chose in action*, of which description is stock, could not be reached by the process of the Court of Chancery.

The authority of the cases of *Taylor v. Jones*, *King v. Dupine*, and *Partridge v. Gopp*, may be considered as shaken, but they cannot be viewed as overruled by these subsequent doubts. The question was, also, much, and learnedly discussed, in *Simmonds v. Lord Kinnaird*, (4 *Vesey*, 735.) whether a *chose in action* was liable to sequestration on *mesne* process in equity; Lord *Loughborough* gave no opinion upon it, but observed, that he wished the process could go to the extent desired, when one considered the immense mass of property that might be supposed in the kingdom, answerable for nothing. "Suppose," he observes, "a great landed estate was converted into an annuity upon the consolidated fund, no process can reach it, unless this Court can get at it. On the other hand, I am not aware of all the consequences of either impounding the money in the hands of the bankers, or making them pay

the money. Why not against the bank? Then it will go to all chartered companies."

It is remarkable, that in all the discussions in this last case, not one of the cases already cited are referred to.

If the case necessarily turned upon this point, I should not feel myself justified, from any thing I have hitherto seen, to abandon, without still more consideration, the authority of the analogous case of *Taylor v. Jones*. But this case may easily, and with more safety, be decided upon its own intrinsic circumstances. The assignment of the 28th of January, 1818, by *M. & O.*, to the plaintiffs *B. & B.*, in trust for the general creditors, was of all their estate, real and personal, and of all books, vouchers and securities relating thereto. All the interest of *M. & O.*, legal and equitable, as well as their rights in action, or as *cestui que trusts*, passed by such a general and sweeping assignment; and they exhibited the stock in question as property belonging to them in reversion, and intended to be passed by that assignment. Unless we can say, that a debtor absolutely insolvent, may voluntarily assign his stock to his wife and children, in utter exclusion of his creditors, and that such an assignment is valid in law, notwithstanding the statute, we ought to give effect to the claim of the plaintiffs. This is not the case of a creditor seeking the aid of the Court to satisfy his debt out of property not to be reached by process; but it is the case of general assignees of the estate seeking the recovery of all that estate, by virtue of the assignment made for the benefit of all the creditors. It is like the case put by Lord *Eldon*, when he says, that "under the bankrupt law, stock is got at." In short, here is the case of a voluntary settlement by an insolvent debtor, which is void under the statute, and here are his general assignees seeking the aid of this Court to recover property to which they have a title.

It is not necessary, therefore, to put the case upon the other ground taken by the plaintiffs' counsel, of a subse-

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quent purchase for a valuable consideration, without notice of a prior voluntary conveyance. I shall, accordingly, declare, that the assignment to the defendants, *H. & C.*, is, as against the title of the plaintiffs, *B. & B.*, null and void; and that the title of these plaintiffs, as trustees, for the purposes expressed in the deeds of assignment to them in the pleadings mentioned, is valid; and the defendants, *H. & C.*, are decreed to hold the stock in the pleadings mentioned, subject, first, to the right of Mrs. *Murray*, to the dividends during her life, and then subject to the orders of the plaintiffs, *B. & B.*; and that neither party have costs as against the other.

Decree accordingly.

HOLMES and others *against* REMSEN and others, *Executors*
of CLASON.

A debt due by *C.* an *American* citizen, to *M.* a *British* subject resident in *London*, was recovered by foreign attachment, and the judgment of the Mayor's Court of the City of *London*, in due course of law, out of monies which had come into the hands of *C's* agents in *London*;—*Held*, that the payment of the debt by the agents of *C.* being compulsory, and by the judgment of a Court of competent jurisdiction, was a bar to a suit brought here to recover the same debt, either by *M.* or by trustees of the creditors of *M.* against whom an attachment had been issued here, at the instance of an *American* creditor of *M.* under the act giving relief against absent debtors, previous to such process of foreign attachment abroad.

The succession to and distribution of *personal* property is regulated by the law of the owner's *domicil*, not by the *lex loci rei sitæ*. It is a principle of international law, to take notice of and give effect to the title of *foreign assignees*. And the assignees of a foreign bankrupt may sue here for debts due to the bankrupt's estate, either as such assignees, or in the name of the bankrupt.

An assignment by the commissioners of bankrupts in *England*, of all the estate and choses in action of the bankrupt, passes a debt due by a citizen of this state to the *English* bankrupt.

And if such assignment is *prior in time* to an *attachment* of the same debt here, at the instance of an *American* creditor of the bankrupt, issued under the act for relief against *absent debtors*, &c. a subsequent payment of the debt to the foreign assignees in *England*, is a bar to a suit brought by the *trustees* appointed under the act, against the debtor here.

A concurrent separate assignment made by the bankrupt to the same assignees, on the same trusts, though it may strengthen the case before the Court, makes no difference as to the application of the general doctrine.

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ISAAC CLASON, of the City of *New-York*, merchant, died in *February*, 1815, and the defendants are his *executors*. In his life time, he was indebted to *Frederick Mullett*, of *London*, in the sum of 2,865*l.* 1*s.* 10*d.* sterling, being the admitted balance of an account between them. On the 7th of *August*, 1816, a warrant of *attachment* was issued against all the estate, real and personal, &c. of *F. M.* as an *absent debtor*, under the act for relief against *absent and absconding debtors*, passed the 27th *March*, 1801: (24 sess. c. 49. 1 *N. R. L.* 157.) Notice of the *attachment* was published on the 8th of *August*, 1816; and the plaintiffs, on the 27th *August*, 1817, were duly appointed *trustees* for all the creditors of *M.* pursuant to the act, and notice thereof published the next day. The plaintiffs, as *trustees*, demanded of the defendants payment of the said debt, who admitted the demand, and that they had sufficient *assets* to satisfy it, but refused to pay. The plaintiffs having commenced a suit in the Supreme Court against the defendants for the recovery of the debt, the defendants obtained an order on the plaintiffs to exhibit a *bill of the particulars* of their demand; and the plaintiffs stated their demand to be for the balance of account as above stated, with interest from the 31st *Dec.* 1814; but the defendants obtained an order to stay the proceedings at law, until a further bill of particulars should be exhibited, which the plaintiffs stated they were unable to do, as the

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defendants had in their possession all the accounts and vouchers relative to the demand, and the books of *M.* were abroad and out of their power or controul; and that they had in vain applied to the defendants, for an inspection of the books and accounts in their possession, as executors.

It was stated in the *answer*, and admitted, that *M.* is a native subject of *England*, and has always resided there, and for the last twenty years has been a merchant in *London*. On the 14th *February*, 1815, after the debt of *Clason* was due and payable, *M.* was duly declared a bankrupt, according to the laws of *England*; and on the same day, an assignment of all his estate and *choses in action* was duly made, by the commissioners of bankrupts, named in the commission issued against him, to *Henry Page*, in trust for the creditors of *M.* On the 25th *February*, 1815, the commissioners and *Henry Page* assigned and conveyed to *Charles Campbell*, *John Deacon*, and *Ives Hurry*, according to the laws of *England*, all the estate and *choses in action*, (so before assigned to *Henry Page*,) in trust for all the creditors of *M.* On the 26th *February*, 1815, *M.* by deed, in consideration of ten shillings sterling, &c. conveyed and assigned to the said *C. C.*, *J. D.*, and *I. H.*, all the debts, personal estate, and effects whatsoever, of him, the said *M.*, now being, arising, or growing within *England*, which he, the said *M.*, was entitled to, or is possessed of, or which any other person or persons was or were possessed of or entitled to, in trust for him, in trust for the same purposes, as mentioned in the former assignments.

In the life time of *Clason*, a ship, called the *Star*, belonging to him, was libelled, and condemned in the Vice Admiralty Court, at *Halifax, Nova Scotia*, and *C.* appealed from the sentence of condemnation to the High Court of Admiralty in *England*, and appointed *Baring, Brothers, & Co.*, his agents, in relation to the appeal. The appeal was pending at the time of *C.*'s death, and the defendants, as his execu-

tors, appointed *Baring, Brothers, & Co.*, their agents in relation to the appeal. On the 21st of *May*, 1818, *Baring, Brothers, & Co.*, with the consent and approbation of the defendants, compromised the appeal, and received a large sum of money from the captors, for the use of the defendants, as executors of *C.* In *October*, 1818, the assignees of *Mullett*, pursuant to the law and custom of *London*, in the Lord Mayor's Court of that city, exhibited their plaint against the defendants, for the money due from *C.* to *M.*, with interest; and, afterwards, procured an attachment to be issued out of that Court, by virtue of which, 3,167*l.* sterling, being part of the money so received by *Baring, Brothers, & Co.*, for the defendants, was attached in the hands of *Baring, Brothers, & Co.*, and such proceedings were thereupon had, that on the 1st of *December*, 1818, a judgment was rendered in the said Court, pursuant to the law and custom of *London*, that the assignees of *M.* should have execution for 3,024*l.* 1*s.* 6*d.* sterling, of the moneys of the defendants, as executors of *C.*, in the hands of *Baring, Brothers, & Co.*; and in *February*, 1819, the assignees of *M.* had execution for that sum of money, and *Baring, Brothers, & Co.* were compelled to pay that amount to the assignees of *M.*, out of the moneys of the defendants, as executors of *C.*, in their hands.

The plaintiffs, in their bill, *prayed*, that the defendants might be decreed to come to an account with the plaintiffs, respecting the sum due from *C.* to *M.*, and render an account of the assets of *J. C.*, which have come to their hands, and that they produce the accounts, books and papers between *C.* & *M.*, and be directed to pay to the plaintiffs, the sum which may be due to them as trustees of *M.*, and not actually paid to *M.*, or to his legal representatives, before the 8th of *August*, 1816.

The cause came on to be heard, on the pleadings and proofs. June 13th.

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Caines, for the plaintiffs. He stated the following points :

1. That the commissioners' assignment under the *English* statute of bankrupts, being merely a statutory transfer under the *municipal* laws and regulations of *Great Britain*, though operative against the bankrupt, and all *British* subjects, all over the world, on the principle of the law of the domicile governing the disposition of personal property, is, notwithstanding, inoperative, null and void, as against an *American* citizen, a creditor of the bankrupt, and residing within the *United States*.

2. That the assignment of the bankrupt himself, being made *eodem fiat^u et eodem intuitu* with the commissioners' assignment, is only a part of the same assignment, making together one single conveyance, of which the commissioners' assignment is the principal, is, therefore, subject to the same laws, and follows the fate of the principal assignment. If it be not a part of the same conveyance, it is an act of bankruptcy itself, and void by the law of the country where it was made.

3. That the assignment of the bankrupt, if it stood alone, would be void, as being *in fraudem legis* of the state of *New-York*, and in fraud of *American* creditors, with intent to subject to the distribution of another, and a foreign *forum*, the property in this country to which the *American* creditors gave credit.

4. That the assignment of the bankrupt is void, being a mere voluntary conveyance, under the statute for the prevention of frauds; the trust for the creditors created by it in foreign trustees, making no consideration sufficient to uphold it, as against *American* creditors.

5. That by the law relative to absent and absconding debtors, under which the attachment issued here, all payments by the defendants, on account of the debt due to the absent debtor, after the 8th of *August*, 1816, when notice of its having been issued was published, were made in their own wrong.

+ *Statu*

6. That the placing in *London*, on the 21st of *May*, 1818, the debt due to the absent debtor, in the hands of *Baring, Brothers, & Co.*, (some of the partners of which house were, also, assignees under the *English* commission,) was, in law, a fraud on the vested rights of the *American* attaching creditor, being, after notice of those rights, collusive and voluntary, in order to subject the fund to the law of attachment of the city of *London*.

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7. And, therefore, the subsequent payment, by judgment of the Mayor's Court of *London*, was, in law, fraudulent, collusive and voluntary; and so, constitutes no valid defence to defeat the rights of the *American* creditor residing in *New-York*, under the previous attachment sued and notified under the law of this state.

But, should the Court be inclined to dismiss the bill, it ought to be without costs. Plaintiffs suing in *auter droit*, are not responsible for costs, unless under special circumstances. (*Goodrick v. Pendleton*, 3 *Johns. Ch. Rep.* 520. 1 *Mad. Ch. Tr.* 173. *Newland's Pr.* 203.) He cited, also, 6 *Binney's Rep.* 353. 5 *East*, 131, 132. *H. Bl. Rep.* 409. 412. 553. *Cranch*, 302. *5 Cranch* 302

P. A. Jay, contra, insisted on the following points:

1. That the assignment under the bankrupt law of *England*, vested in the *English* assignees all the personal estate of the bankrupt, *F. M.*, in this state, as well as in *England*; and, therefore, the right to the money now claimed by the plaintiffs, could not vest in them, by virtue of the subsequent proceedings under the act relative to absent debtors.

2. If the personal estate of the bankrupt here, did not vest by the assignment under the bankrupt law of *England*, it passed by the voluntary assignment made by *F. M.*, long previous to the proceedings under the act relative to absent debtors.

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3. The defendants having been compelled, by due course of law, to pay the money in question to the assignees in *England*, cannot now be compelled to pay it, also, to the plaintiffs. He cited 4 *Term Rep.* 182. 186. 190. 192. *Dow's Rep.* 170. 1 *East*, 15. 1 *Johns. Cases*, 51. 1 *Johns. Rep.* 118. 2 *Johns. Rep.* 344. 1 *Rose's Bankrupt Cases*, 462. 2 *Rose, B. C.* 99. 284. 315.

THE CHANCELLOR. This is a bill filed by the trustees of *Mullett*, an absent *English* debtor, to compel payment of a debt due to him from the defendants, as executors of *Clason*. The defendants admit the original debt, and assets, and the character of the plaintiffs, as trustees, duly appointed under the act for relief against absconding and absent debtors. But they set up in their answer two grounds of defence: (1.) That assets of their testator, in the hands of *Baring, Brothers, & Co. of London*, to the amount of the debt, were attached in the *Lord Mayor's Court of London*, at the suit of the assignees of *Mullett*, who had been declared a bankrupt; and that the debt was in that way recovered by judgment and execution, and paid. (2.) That *Mullett* was declared a bankrupt, under the bankrupt laws of *England*; and all his personal estate, and debts, vested in assignees, by assignment, prior to the institution of proceedings in this State, against *Mullett*, as an absent debtor. and that the right to the debt passed thereby to those assignees.

(1.) If the defendants are bound to account to the plaintiffs, as trustees of *Mullett*, for the amount of the debt which their testator, at the time of his death, owed *Mullett*, they will have paid the debt twice. The debt has already been paid to the assignees of *Mullett*, under the process of foreign attachment, and it certainly cannot be recovered back. It was a compulsory payment, under a regular judgment and execution, and to the legally constituted assignees of *Mullett*. There is nothing in the pleadings, or proofs, to support the allegation of the plaintiffs' counsel, that the

Payment by the garnishee, under a judgment and execution on a foreign attachment, in *London*, of a debt due by a citizen of *New-York*, to a creditor in *England*, is a good bar to an action brought against the debtor here by trustees, under the act giving relief against absent debtors; though the attachment here issued before the money of the debtor came into the hands of the garnishee, and before the foreign attachment issued in *England*.

+ 1 *Dow's*

recovery in *London* was fraudulent and collusive between the defendants and the assignees. The assets were not placed in the hands of the garnishees for any such purpose. It appears from the facts admitted, that the defendants' testator had, in his life-time, a ship libelled and condemned, at *Halifax*, and that he had appealed to the High Court of Admiralty, in *England*, and appointed the house of *Baring, Brothers, & Co.* his agents, in relation to that appeal. This appeal was pending at his death, and his executors continued the agency of it in the house where their testator had placed it. In *May*, 1818, the appeal was settled upon terms approved of by the defendants, and the money due from the captors of the ship paid to the agents; and in *October* following, a portion of this money was attached by the assignees of *Mullett*, for the debt in question. There is no just colour or pretence, from these facts, for saying, that the moneys of the testator were placed in the hands of *Baring, Brothers, & Co.* with any fraudulent views, in respect to the demand of the plaintiffs.

The question now is, whether that recovery of the debt is not a conclusive bar to the claim set up by the bill? In my opinion the question cannot admit of a moment's doubt. The garnishees had no means of retaining the money, so attached, in their hands. The recovery is a good defence to them against any claim, on the part of the defendants. A garnishee can plead the recovery, even though the plaintiff did not prove his debt, and even though the original debtor had not notice, in fact, of the attachment. If the proceedings under the foreign attachment be not void, they constitute a good defence. (*M Daniel v. Hughes*, 3 *East*, 367.) Nor could the defendants, by any means whatever, have repelled the suit in the Lord Mayor's Court. The debt had been acknowledged by their testator, and the title of the assignees was indisputable; and to compel them to pay the debt out of their own monies, or to charge the debt a second time upon the assets of their testator, would, in

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either view, be an act of injustice not to be endured. If money be duly attached in the hands of a party, and he has paid it, pursuant to the judgment of a competent foreign Court, I am to presume *omnia rite acta*; and it may be laid down as a clear principle of justice, that a person compelled, by a competent jurisdiction, to pay a debt once, shall not be compelled to pay it over again. The weighty observation of Lord Bacon, (*De Aug. Sci. lib. 8. c. 3. aph. 96.*) is perfectly applicable; *ut Curia, judicia utrobique reddita (quæ nil ad jurisdictionem pertinent) libenter rescindant, intolerabile malum, et a regibus, aut senatu, aut politia, plane vindicandum.* This doctrine was understood, and explicitly declared by the Supreme Court, in *Embree & Collins, v. Hanna*, (*5 Johns. Rep. 101.*) where it was stated, that, if a debt had once been recovered of the debtor abroad, under the process of foreign attachment, the recovery was a perfect protection against the original creditor. In the present case, the debtor has been compelled to pay the debt once to his creditor, who called upon him in the character and name of his *English* assignees; and now the debtor is called upon again for the same debt, by the same creditor, in the representative character of his *American* trustees. Which of these representatives would have the better title to the debt, if it were still unpaid, may be one question; but certainly, when the title of the assignees, and of the trustees, is equally valid, under the laws of their respective countries, the debt is well paid to the party that uses the best diligence, and first recovers the debt. In the case of *Embree & Collins, v. Hanna*, a prior pending attachment of the debt, in another State, was held to be good, by way of plea, in abatement of a suit by the creditor; and a judgment upon a foreign attachment is held to be a good plea in bar. (*Savage's case*, 1 Salk. 294. 5 Taunton, 558.)

The title of the foreign assignees, and of the American trustees, being equally valid under the laws of their respective countries, the debt is well paid to the party who has used the greatest legal diligence to recover it.

(2.) That the *English* assignees had a good right to demand, sue for, and recover the debt from the defendants, in the man-

ner they did, cannot be denied. But putting the proceeding under the foreign attachment out of view, the payment of the debt to the assignees of *Mullett*, considered as a voluntary payment, was good; for the entire and exclusive right to the debt, passed by assignment from *Mullett* to his assignees, prior to notice of the attachment issued under our statute. This brings me to consider the other point raised by the case, viz.—whether the plaintiffs have shown any right to the debt, considering that *Mullett* was duly declared a bankrupt, and his personal estate assigned, under the bankrupt law of *England*, prior to the time that proceedings were instituted against him, under our statute, as an absent or absconding debtor? After the best consideration which I have been able to give to this question, it has appeared to me to be a rule of national law, that the proceeding which is prior in point of time, attaches to itself the distribution of the fund. We have no direct decision upon that point, in this State; though in the case of *Bird, Savage & Bird, v. Caritat*, (2 *Johns. Rep.* 342.) it was assumed to be “a principle of general practice among nations to admit and give effect to the title of foreign assignees. This was done on the ground, that the conveyance under the bankrupt laws of the country where the owner was domiciled, is equivalent to a voluntary conveyance by the bankrupt; and that the general disposition of personal property by the owner, in one country, will affect it every where; because, in respect to the owner’s control over it, personal property has no locality.”

That the succession to, and disposition of personal property, is regulated by the law of the owner’s domicile, has become a settled principle of international jurisprudence, founded on public convenience and policy. This general principle is amply discussed and illustrated by *Huber*, under the well known title, *de conflictu legum*; and that essay is every where received as containing a doctrine of universal law. *Heineccius* (*De Testamenti factione Jure Germanico*,

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The succession to, and the distribution of, personal property, is regulated by the *lex domicilii*, not by the *lex loci rei sitæ*.

Opinion of
Huber on this
question.

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The same principle of general law that governs marriage contracts, testamentary dispositions, and the succession to the personal estate of intestates, applies to the distribution of the estate of a bankrupt.

s. 30. *Opera*, tom. 2. 972.) cites that treatise, and the same doctrine in *Strykius*, as the received law in *Germany*. The same general law that governs the marriage contract, and testamentary dispositions, and the succession to intestates' personal estates, applies with equal force and convenience to the disposition of bankrupts' effects. This mutual respect of nations, as *Huber* terms it, or courtesy of international law, is founded on the credit which one country gives to the administration of justice in another, and the adoption of it wonderfully increases reciprocal confidence and credit. It would seem to be peculiarly beneficial in respect to the property of bankrupts; for the just and equal distribution of the funds of that class of debtors, becomes the common concern of the commercial world; and the decisions on that subject now form a code, of what *Mr. Rose* aptly terms "international bankrupt law." The presumption ought to be, that justice will be well administered in every civilized country; and in the application of the law to bankrupts, that the foreign creditor sent to the bankrupt's domicile for his dividend, (and the inconvenience of such a resort is not very great, considering the facility and rapidity of commercial correspondence) will obtain the same measure of justice as the other suitors of the country. It is the presumed will of every person dying intestate, that his moveables, which by fiction of law have no locality independent of his person, should be brought home, and distributed according to the law of his own place. A different rule, says *Lord Hardwicke*, would be extremely mischievous, and affect the commerce of the country. So, it is equally to be presumed to be the understanding of the commercial world, that the funds of the bankrupt should be distributed according to the law of the place where he resided, *animo manendi*, and where the credit was bestowed.

It is apprehended, that there would be great inconvenience (and it has been frequently detailed) in allowing co-existing commissions upon a bankrupt's estate, to have con-

current operation, *simul et simul*, in different countries; unless, as Lord *Eldon* observed, the one that is subsequent in point of time, be used merely as the means of assisting the distribution of the funds under the other. It would be in the power of the bankrupt to throw his property under the distribution of either commission, at his pleasure; and it would put creditors upon calculations of exclusive advantages, and of running a race of diligence against each other, and of resorting to the one fund or the other, as circumstances might dictate. The perplexities arising from the concurrent operation of distinct commissions would be increased, if the commercial house had establishments in different countries, with joint and separate debts belonging to each firm, to be distributed. Such a state of things, and such conflicting systems, would lead to great inconvenience and confusion, and be the source of fraud and injustice, and disturb the equality and equity of any bankrupt system.

The principle of international law, in reference to this subject, which appears to be now incorporated into the jurisprudence of every part of the united kingdom of *Great Britain and Ireland*, and which is there uniformly asserted (and I presume, upon good authority) to be a reciprocal rule of practice among the other nations of *Europe*, is certainly calculated to remove all collision and discord, and to promote general confidence, harmony and justice. It is a rule of decision, and not a question of jurisdiction, and has no alarming effect whatever upon the rights of territorial sovereignty and independence. It is admitted, in all the cases, that every country may, by positive law, regulate as it pleases, the disposition of personal property found within it, and may prefer its own attaching creditor to any foreign assignee, and no other authority has a right to question the determination, though, as Lord *Loughborough* said, they "must suppose that determination wrong." This was so ruled, also, by Lord *Mansfield*, in *Le Chevalier v. Lynch*.

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Inconvenience of co-existing commissions on the estate of a bankrupt, in concurrent operation in different countries.

The principle of national law on this subject, is a rule of decision, not a question of jurisdiction; and does not affect the rights of territorial sovereignty.

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Huber's state-
ment of the
doctrine.Sir William
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nion.

(*Doug.* 170.) The true question is, whether it be not wise, and politic, and just, (where no positive law intervenes, and where it is not repugnant to the essential policy and institutions of the country,) to adopt the rule of international law which other nations apply to us, and which impairs no right, but promotes general justice, and is founded on the mutual respect, comity and convenience of commercial nations. *Huber* has placed this subject on proper grounds, when speaking of the effect of the law of the foreign domicil, operating upon property within another jurisdiction: *Non vi legis alienæ immediata, sed accedente consensu potestatis summæ in altera civitate, quæ legibus alienis in loco suo exercitis præbet effectum; sine suo suorumque præjudicio, mutæ populorum utilitatis respectu, quod est fundamentum omnis hujus doctrinæ.* (*Lib.* 1. tit. 3. *de conflictu legum*, s. 9.)

Marriage contracts, says Sir *Wm. Scott*, in *Gordon v. Dalrymple*, must, in an *English* Court, be adjudicated according to the principles of *English* law; and what are the principles of *English* law applicable to such a case? They are, that marriage rights must be tried by a reference to the law of the country where they had their origin. "Having furnished this principle, the law of *England* withdraws altogether, and leaves the legal question to the exclusive judgment of the foreign law."

The decisions of Lord *Hardwicke* have applied the rule, that *mobilia non habent situm*, and that they are to be distributed according to the law of the owner's domicil, not only to the case of intestates' estates, but to the case of bankrupts' effects. In *Pipon v. Pipon*, (*Amb.* 25.) and in *Thorne v. Watkins*, (2 *Ves.* 35.) the rule was applied to the distribution of intestates' estates. Lord *H.* observed, that taking a ooreign probate or letters of administration in the country where the property was situated, was but "for form," and to enable the party to sue; and that all debts followed the person, not of the debtor, but of the creditor to whom due; and that it would be most mischievous, if they

were to follow the person of the debtor. He said, the same doctrine had been applied, in the House of Lords, in *Morrison's* case, which was a case of lunacy, and the rule would be the same on a question between a Court of *France* and a Court of *England*. The case of Captain *Wilson*, an *English* bankrupt, which is cited by Lord *Mansfield*, in *Le Chevalier v. Lynch*, but cited and more fully explained by Lord *Loughborough*, in giving his opinion in *Sill v. Worswick*, (1 *H. Bl.* 691.) is the one in which the *lex domicilii* was applied by Lord *Hardwicke*, to the distribution of a bankrupt's estate. He said, that the Court of Session in *Scotland*, entirely concurred with Lord *Hardwicke* in that case. There were three sets of *Scotch* creditors who put forward their claims in opposition to the title of the *English* assignees.—Some of the creditors of *Wilson* had an assignment of specific debts, with intimation or notice to the debtor, so as to create, under the *Scotch* law, a specific lien, *quoad* that debt. Other creditors had assignments, without any such intimation prior to the bankruptcy, and which, by the *Scotch* law, gave the assignee a right inferior to that of the creditor who had obtained his assignment and intimated it. A third class of creditors had arrested or attached the debts, subsequent to the bankruptcy. Lord *H.* and the Court of Session agreed, that the first class of creditors were to be considered as claiming by mortgage, before bankruptcy, and if they came in under the *English* commission, they must come in on the footing of other creditors, and were first to account for what they had received; and they further agreed, that the title of the second class by assignment, was preferable to the title by arrestment; and that the *arrestments*, (which is a *Scotch* process for the recovery of debts,) being subsequent to bankruptcy, were of no avail, the property being, by assignment, vested in the assignees under the commission.

I should presume we might rely upon the entire accuracy of Lord *Loughborough's* report of the case of *Wilson*. The state of this case, which is loosely given in *Cleve v. Mills*,

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(*Cooke's B. Law*, 243.) decided by Lord *Mansfield*, at the Cockpit, in 1764, is manifestly incorrect; and it further shows, that the short note of the case of *Cleve v. Mills*, is not sufficiently authentic to be regarded. This case of *Wilson* is also cited by counsel in *Selkrig v. Davis*, under the title of *Assignees of Wilson v. Fairholme*, as being decided in 1755, and the account of it coincides with Lord *Loughborough's* report. The case of *Morrison*, mentioned by Lord *Hardwicke*, is more fully stated by Serjeant *Hill*, in his very elaborate argument in the case of *Sill v. Worswick*. From these cases, we have full evidence that in the time of Lord *Hardwicke*, it was understood and settled, as the rule of international law, that the effects of intestates, of lunatics, and of bankrupts, were to be distributed, not according to the *lex rei sitæ*, but according to the law of the owner's domicil. It was also settled, that in the latter case, an attachment by a *Scotch* creditor, under the *Scotch* law, subsequent to bankruptcy, would not avail against the right of the *English* assignees; and that in the second case, the committee appointed under a commission of lunacy, had a right to sue for and recover his property in *Scotland*, equally as if they held under his voluntary assignment.

If we follow the cases down from that period, we shall find the same principle equally recognized, but with the advantage of being more matured, more fully developed, and better understood.

Opinion of Mr.
Justice Bathurst.

In *Solomons v. Ross*, (1 *H. Bl.* 131. *note*,) which, in 1764, came before Mr. Justice *Bathurst*, sitting for Lord *Northington*, the parties were merchants in *London*, and Messrs. *De-neufvilles*, of *Amsterdam*, corresponded with them. In 1759, Messrs. *D.* stopped payment, and in 1760, the chamber of desolate estates, in *Amsterdam*, took cognizance thereof, and they were declared bankrupts, and curators or assignees of their effects appointed. *Ross* was a creditor of theirs, and two days after they had stopped payment, and a few days before the curators were appointed, he attached, in

the Mayor's Court, in *London*, their money in the hands of their debtor, *M. Solomons*. In 1760, *Ross* obtained judgment by default, and execution issued against *S.* the garnishee, who gave *Ross* his note for the debt. After this, *I. Solomons*, as attorney for the curators, filed a bill in chancery on their behalf, praying that the garnishee might account as debtor to them, and be restrained from paying *Ross*. *S.*, the garnishee, filed a bill of interpleader, and brought the money into Court; and it was decreed, that the money be paid to *I. Solomons*, the complainant, for the creditors of the bankrupts, and that *Ross* deliver up the note, to be cancelled.

This is a strong and interesting decision, applying, in favour of other nations, the rule which *England* asks for herself. There can be no doubt of the general authenticity and accuracy of the report. Lord *Loughborough* said, he was counsel in the cause, and that it was decided solely upon the principle that the assignment of the bankrupt's effects to the curators of desolate estates, was an assignment for a valuable consideration, and therefore acknowledged in *England*, agreeable to Captain *Wilson's* case in the House of Lords. The principle of the case is valuable and imposing; but I think the application was pushed too far, if the dates are given correctly; for the attaching creditor had commenced his suit, and so gained a priority in time, before the curators were appointed in *Holland*. Perhaps, however, the Court may have considered the title of the curators, as relating to the time when the bankrupt stopped payment, and on that ground, the decree was correct; though it would seem, from proof taken some years afterwards, in the case next to be cited, that a bankrupt's effects in *Holland* vested only from the appointment of the curators. An error on this matter of fact, does not in the least impair the value and authority of the case, as to the principle it contains.

Again, in *Jollet v. Deponthieu and Baril*, which arose be-

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fore Lord Ch. *Camden*, in 1769, (1 *H. Bl.* 132. *note*,) the *Deneufvilles*, (but not those in the former case,) merchants at *Amsterdam*, stopped payment on the 30th of *July*, 1763. On the 8th of *October* following, the plaintiffs were appointed curators of their effects, and the bankrupts owed the defendant *D.*, of *London*. On the 5th of *Jan.* 1764, the defendant *D.*, attached the money of the bankrupts, in the hands of *B.*, one of the defendants, and a debtor of the bankrupt. Pending the attachment, the curators filed their bill for an account between the bankrupt *B.*, and that the balance might be paid to them, and the defendant, *B.*, restrained from proceeding on the attachment. The decree was, that the plaintiffs recover the balance due, and that a perpetual injunction issue against proceeding on the foreign attachment.

Lord *Kenyon*, in *Hunter v. Potts*, (4 *Term Rep.* 182.) speaks of this and the preceding decision as correct; and he says, that Lord *Camden* thought this last a very clear case; and it establishes this great doctrine, that the title of the foreign assignee of a bankrupt's estate, under the law of the bankrupt's domicile, was to be preferred to the subsequent attachment of the domestic creditor, made here under our own attachment law.

The case of *Neale v. Cottingham and Houghton*, (1 *H. Bl.* 132. *note*,) arose in *Ireland* before Lord Ch. *Lifford*; and Lord *Kenyon*, in reference to this very decision, speaks of that Chancellor, as a very respectable authority. *G.*, a merchant in *London*, was indebted to the defendant *C.*, a merchant in *Dublin*, and the defendant *H.* was indebted to *G.*, and on the 27th of *October*, 1763, *C.* attached the debt due from *H.* to *G.*, for his debt. On this attachment, judgment was rendered, in 1764, and *H.*, the garnishee, was taken in execution, and then paid the debt. On the 28th of *October*, 1763, a commission of bankruptcy issued in *England*, against *G.*, and he was on that day declared a bank-

Décision by
the Chancellor
and Judges
of *Ireland*.

rupt. On the 10th of Nov. 1763, his effects were assigned to the plaintiffs, who, in Nov. 1764, filed their bill in the Court of Chancery in *Ireland*, against *C.* and *H.*, praying for an account of the monies received by *C.* from *H.*, for the debt due *G.* before his bankruptcy, and that *C.* might be decreed to pay it. The Lord Chancellor, (as the case was new,) called in the assistance of the judges, and after great consultation, he, with their approbation, decreed in favour of the plaintiffs, and ordered *C.* to pay the money he recovered of *H.*

This case went farther than, I apprehend, the doctrine on the subject requires, for it gave effect to the title of the assignees, by relation back, beyond the time of their appointment, to the time of the act of bankruptcy committed, and so overreached the time of the attachment. This doctrine of relation, is a positive rule of mere municipal policy, which no other country is bound to adopt, as it would lead to great inconvenience; and it is sufficient upon the rule of the international law, as now declared and understood, to give effect to the title of the assignees, from the time the assignment to them was actually made, as being a substitute for the voluntary assignment of the bankrupt himself; and, perhaps, we may say that no concession is to be made to foreign interests, which would materially disturb the whole order and policy of our internal arrangements. The rule is, that *comitas* is to be observed, *quatenus sine præjudicio indulgentium fieri potest*.

The recognition of the title of foreign assignees had now become so well settled, and was so generally received, as a rule of public law, that when Lord Thurlow was told, (in Nov. 1787.) in the case *ex parte Blakes*, (1 Cox, 398.) that in *America*, the interest of the assignees, under the *English* bankrupt laws, was not noticed, he observed, with surprise, that "he had no idea of any country refusing to take notice of the rights of the assignees, under their laws, and he believed every country on earth would do it, besides."

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But the title of the foreign assignees, takes effect only from the date of the assignment to them, and has no relation to the time of the act of bankruptcy committed.

For the doctrine of relation, in regard to bankrupts, is a positive rule of mere municipal policy; and the rule of comity between nations does not require its adoption.

Lord Thurlow's observation, in 1787.

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In *Hunter v. Potts*, (4 Term Rep. 182.) it was decided, that if, after assignment of a bankrupt's estate, a creditor, knowing of it, and residing in *England*, attaches the money of the bankrupt abroad, the assignees may compel him to refund it. As this case was decided between subjects of the same government, and equally owing obedience to the bankrupt laws, and on the ground that they must do no act to contravene them, it does not directly apply to the question before me. But it is a case well worthy of attention, as it treated, largely and liberally, the general subject under discussion; and I think it may be considered as the acknowledged law of that case, that the representative character of the assignees of a bankrupt, is recognized by the general law of nations, which adopts the *lex domicilii* as the rule, in respect to personal property. It was held by the Court, that the personal property of the bankrupt, wherever situated, passed by the assignment in the same manner as if the owner had assigned it by his own voluntary act, unless there was a positive law of the foreign country, where the property was situated, directing a particular mode of conveyance; and Lord *Kenyon* took occasion to observe, that an assignment, under the bankrupt acts, might be taken to be an assignment for a valuable consideration.

The case of *Sill v. Worwick*, (1 H. Black. 665.) was decided shortly after in the *C. B.* upon the same ground; that an *English* creditor, after an act of bankruptcy, cannot attach, in a foreign country, money due to the bankrupt, without being liable to refund it to the assignees. This case is distinguished for the precision, perspicuity, and force with which Lord *Loughborough*, in behalf of the Court, declared the general doctrines of international law, on the subject of the operation of bankrupt laws, *extra territorium*. He observed, that it was a clear proposition, not only of the law of *England*, but of every country in the world, where law had the semblance of science, that personal property had no locality, and was subject to the law which governed the

Lord *Loughborough's* exposition of the law on this subject.

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person, both with respect to the disposition of it, and to the transmission of it, either by succession, or the act of the party—that there was no difference in the cases on this subject, if they were rightly understood, and rightly applied—that if the *English* bankrupt had personal property out of the jurisdiction of the law of *England*, and which by the law of *England*, was, upon the bankruptcy, vested in his assignees, if the country where it lies proceeds according to the principles of well regulated justice, there is no doubt but that it will give effect to the title of the assignees—that the determination of the Courts of *England* had been uniform to admit the title of the foreign assignees: he referred to the cases of *Solomons v. Ross*, and of *Jollet v. Duponthieu*, (which have been already cited,) as founded on general law, preferring the title of the assignees to the title of the arresting creditor, and declared that the principle he had stated, had a very universal observance among nations.

He held, that an assignment, under a commission of bankruptcy, was for a just consideration, and was to be preferred to the claim of all creditors, wheresoever, who had not acquired a specific *lien* prior to the act of bankruptcy committed, though he admitted that, if by the law of a foreign country, a foreign creditor had been preferred, it could not be helped; and such preference, however repugnant to principle, could not be disturbed.

The same question decided in the two preceding cases, came before all the judges, in the Exchequer Chamber, on error from the K. B. in *Philips v. Hunter*. (2 *H. Blacks.* 402.) All the judges who expressed any opinion, except one, concurred in the judgment of the K. B., and gave their sanction to the general doctrine contained in these cases. It was admitted, that, before bankruptcy, the bankrupt might assign his property abroad as absolutely as if it had been in his own tangible possession; and the assignees were entitled, by operation of law, to deal as he might have done with his property. The whole property of the bank-

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the common
law judges, in
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rupt must be under their control, without regard to its locality, except in cases which militated against the particular laws of the foreign country. If the bankrupt laws were circumscribed by the local situation of the property, a door would be opened to all the partiality and undue preference which they were framed to prevent, and property would be sent abroad, with unjust views, by the bankrupt, immediately previous to his failure. It was, therefore, on wise principles, that foreign States acknowledged and acted according to the different civil relations which subsist between men in their own country.

Lord Ellenborough's
opinion, 5 East,
131.

But why need we go further with *English* cases on this subject? To recognize the laws of foreign countries as binding on personal property, in a variety of cases, has been so long settled in principle, that according to Lord *Ellenborough's* expression, (5 *East*, 131.) it is now *laid up* among our acknowledged rules of jurisprudence.

We have two recent decisions in the Court of Session in *Scotland*, (and one of them affirmed, in the House of Lords,) in which this great doctrine of national law has been profoundly discussed, and laid down and vindicated with distinguished learning and ability.

Opinions of
the Judges of
the Court of
Session in
Scotland,
1813.

Stein's case (1 *Rose's Cases in Bankruptcy*, App. p. 462.) was decided in 1813, and it declared the law to be, that an *English* commission of bankruptcy vested in the assignees all the property of the bankrupt, wherever situated, precluding creditors in *Scotland* from subsequently attaching, by sequestration, their debtor's property in *Scotland*, and from administering it in a course of distribution under such process of sequestration. It further declared, that a sequestration in *Scotland*, would preclude *English* creditors from suing, or sustaining a commission against a debtor who was the subject of the prior sequestration; and that, whether the *English* commission, or the *Scotch* sequestration, was to be preferred, as to the mode of administering the debtor's effects, depended upon their priority.

Lord *Robertson*, in giving his opinion, observed, that it was a question of great importance, what was to be the effect in *Scotland*, of an *English* commission of bankrupt; that they had clear principles of international law to govern them, and to which they ought to adhere, unless they were to throw into confusion the whole system of bankrupt law. That the effect to be given to such a commission in every country where the true principles of international law were understood, was, that it must carry the whole effects belonging to the bankrupt, and that the subsequent *Scotch* sequestration could not be permitted to control the commission. That moveables followed the person of the owner, and their condition was governed by the law of his domicile, a fiction introduced upon the soundest principles of justice; and, in practice, attended with the most beneficial consequences. Lord *Meadowbank*, who, also, gave his reasons at large, concurred in the same doctrine, and declared, that after a commission, nothing remained of the personal estate, on which a sequestration could operate, any more than under a voluntary conveyance by the bankrupt. He admitted it was formerly a principle, that a judicial transfer only operated *intra territorium*, and had no binding influence abroad; but the new rule had now been so long recognized, that it *might be considered a principle of the law of nations*. A marriage operated as a legal assignment of the property of the wife to the husband, without regard to territory, all the world over, and he perceived the predominant, the irresistible necessity, in point of expediency, of adopting the rule that Lord *Hardwicke* adopted in one of the cases, when a departure from it would be attended with inextricable confusion.

All the other Judges of the Court of Session were of the same opinion, and expressed themselves to the same effect. One of them (Lord *Bannatyne*) observed, that a prior *English* commission did not, *ipso jure*, prevent the award of a

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sequestration, though the effect of it would be an after question, depending on circumstances which might, perhaps, justly destroy the effect of the commission. But the Court reserved themselves upon the point, whether, in case they were satisfied, the party subjected to the commission was domiciled in *S.*, and had not been duly domiciled in *E.*, where the commission issued, they were bound to give effect to it. The *Lord Justice Clerk* held, that they were bound to watch, lest any such proceedings should be carried on by persons domiciled in *Scotland*, which might interfere with the application of their own rules of law.

This decision of the highest Court of law and equity in *Scotland*, upon a point of public law, comes with much authority, after so full and elaborate an investigation of the question. Nor are we permitted to presume that it proceeded from a principle of mere deference to the *English* law, or system of jurisprudence. We have several decrees of that same Court, and by the same Judges, supporting *Scotch* decrees of *English* marriages between *English* subjects, (see *Ferguson's Reports of some recent decisions by the Consistorial Courts of Scotland, passim*), in which the independent spirit of their administration of the law, in opposition to *English* law and policy, and in opposition to what was deemed by the Consistorial Court, international law, is sufficiently demonstrated. They feel perfectly free, whenever they deem it proper, to vindicate the supremacy of the law of *Scotland* within its own territory.

The opinion of
the Court of
Session in
Scotland,
affirmed in the
House
of
Lords.

The other case to which I alluded, is that of *Selkirk v. Davis and Salt*, (2 *Dow.* 230. 2 *Rose*, 291. S. C.) decided in the House of Lords in 1814, on appeal, and in affirmation of the decree of the Court of Session. The case was discussed very much at large upon the appeal, and a history given of the *Scottish* decisions on the question, from the year 1747; and I believe it is understood, that on such appeals the municipal law of *Scotland* is carefully observed.

By the decree, it was declared to be the settled law in *Scotland*, founded on a principle of international law, that the assignment under an *English* commission of bankruptcy, vests in the assignees, without the necessity of intimation, the whole personal estate of the bankrupt in *Scotland*, or wherever situated, and that the effect of all subsequent diligence by any *Scotch*, or other creditor, was thereby precluded. In this case, a commission issued in *England* against a debtor, part of whose property consisted of shares of *Carron* stock, and a creditor in *Scotland* afterwards arrested those shares, and it was held by the Court of Session, and, on appeal, by the House of Lords, that the title of the assignees was preferable. It was, likewise, held, that the commission did not affect real property in *Scotland*, nor impose any legal (though Lord *Eldon* thought it did, also, a moral) obligation on the bankrupt to convey to his assignees; but the creditors had it in their power to enforce a proper conveyance of the real estate, by giving, or withholding the bankrupt's certificate.

The counsel for the respondents observed, (and their doctrine may well be assumed to be the doctrine of the House of Lords, which affirmed the decree,) that it had been repeatedly decided, that a foreign commission passed the effects in *England* to the foreign commission, and the presumption was, that such was the law of all the world. That when it was said, that the property of the bankrupt abroad might be attached, notwithstanding the commission, it meant only, that the law of *England* could not be administered in foreign countries, and that the law of a particular state might form an exception to the general rule among civilized nations. That if two nations were at war, it might be doubted whether a commission in one country, could prevent the effect of an attachment in the other, where the attaching creditor could have no remedy under the commission, and that the only distinction was, whether the creditor

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could have his remedy. That this rule was not the result of domicil, but of the courtesy of international law.

Lord Eldon, in giving his reasons in the House of Lords, in favour of the decree, said, that *Stein's* case involved the general principle; and he agreed that the *Scotch* cases, prior to that of *Sroothers v. Reid*, in 1803, exhibited a very distressing versatility of opinion. But it was clear, that the *English* commission passed the personal property in *Scotland*, and in all other parts of the world; and there was no authority or *dictum* to the contrary. A general assignment by a bankrupt, of all his effects, for the benefit of all his creditors, operated like a transfer by marriage, in *England*, which rendered the *Scotch* property of the wife her husband's, without the necessity of notice; and the *Scotch* law, as to intimation or notice, did not, and could not apply, without cutting up by the roots the use of an *English* commission in relation to *Scotch* property.

We have now shown that the rule in question is firmly settled, and recognized as a rule of national law, by all the Courts in *England*; by the Court of Chancery in *Ireland*, and by the Court of Session in *Scotland*. The opinion of so many tribunals, of such high character and great learning, is certainly to be considered as very strong evidence of the existence of the rule, to the extent, and with the pretensions under which it has been announced.

I entertain no doubt that the same rule is known and observed among the other nations of *Europe*. It is embraced by the general principle, so universally recognized by the civilians, that the distribution and disposition of personal property, are governed by the law of the owner's *domicil*.

Law of France
on this subject.

But in the appendix to *Cooper's Bankrupt Law*, p. 27. we have a report of the case of *Parish v. Sevon*, decided in the *French Court*, at *Dunkirk*, in 1780, which is perfectly in accordance with the preceding cases. The defendant, a merchant at *Paris*, and a creditor of *C. & C.*, *English* bankrupts, had attached, at *Dunkirk*, a debt in the hands of *De*

Gravier, due to the bankrupts before their failure. The attachment was laid subsequently to the issuing of the *English* commission; and the question arose in the city Court at *Dunkirk*, between the *English* assignees of the bankrupts, and the *French* attaching creditor, which had the better title to the money in the hands of *De Gravier*, the garnishee. The cause was heard, and received mature deliberation; it was declared that the assignees were entitled to the money, and that the attachment be dissolved, and the *French* creditor was even condemned to pay the costs. The opinions of two advocates of the Parliament of *Paris*, had been previously taken by the *English* assignees, which opinions are subjoined to the case; and they agreed that the *French* creditor was not entitled, in consequence of his attachment, to any privilege or preference over the general creditors, but must take his rateable dividend under the *English* commission. In one of these opinions, dated at *Paris*, 4th December, 1778, and given by *M. Baille*, it was observed, that the laws of commerce were a branch of the law of nations, and that the property of an insolvent debtor, wherever it may be found, was the common pledge of all his creditors, whether natives or aliens; and that personal property followed the person of the owner, and was governed by the laws of the place where he resided. Commercial contracts were to be governed by the universal law of nations; *non erit lex alia Romæ, alia Athænis*.

It is admitted in every case, that foreign assignees, duly appointed under foreign ordinances, are entitled, as such, to sue for debts due to the bankrupt's estate. So far, says Lord Kenyon, in *Smith v. Buchanan*, (1 *East*, 6.) we give effect to foreign laws of bankruptcy, on the ground, that personal property must be governed by the laws of the country where the owner was domiciled. This is a recognition of their title, and an admission of the substitution, as made by the *lex loci*; and it seems difficult to make a dis-

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charge.

inction between its validity for this purpose, and not for every other reasonable purpose of securing the bankrupt's effects. But there is an inconsistency, as it has been alleged, in the practice on this subject, which gives effect to the assignment, and will not give effect to the bankrupt's certificate of discharge. Lord Talbot, as long as a century ago, (*Cooke's B. Laws*, 347—*Beawes' Lex Mer.* 6th ed. 516.) complained of this inconsistency; and while he admitted that the assignment carried with it the bankrupt's effects abroad, he thought it would be reasonable that the certificate should be co-extensive in its operation with the assignment. The Court of Session, in *Stein's* case, went the whole length of declaring that a certificate obtained under an *English* commission, operated as a discharge of the debts of the *Scotch* creditors, proveable under the commission. Admitting that there is a want of harmony between the parts of the system of rules on this subject, it will not affect the binding force of the rules, taken separately, that the assignment does carry all the personal property of the bankrupt, wherever situated; and that the certificate is no bar to a foreign creditor, who does not come in under the commission. Suppose the debtor, independent of the statutes of bankruptcy, or in a case where they did not apply, or in a place where they did not exist, had made a general assignment of all his effects to trustees, for the benefit of all his creditors, it would, no doubt, have been a good and valid assignment, and have carried all his effects; but it would not have been a bar to the suits of those creditors who did not come in and take their share of the property upon his terms. The assignment, however, would have carried, in equity, all his foreign debts, and prevented a subsequent attachment of them. In *Lewis v. Wallis*, (*Sir T. Jones*, 223.) the K. B. held, that after the assignment by *A.* to *B.*, of a debt due to *A.* from *C.*, it became the right of property of *B.*, and *A.* had no

interest in it, but as a trustee for *B.*, and the debt was no longer liable to a foreign attachment, as the debt of *A.* It is a very clear proposition, that a voluntary assignment, made *bona fide*, by a debtor for the payment of his debts, is valid, and founded on a valuable consideration, and will operate upon his foreign debts, and preclude a subsequent attachment of them. These rules, which may be apparently conflicting, rest on very different principles, and which are sufficient to sanction each of them, in their diversity. We are bound to give effect to the assignment, because it is equivalent to a voluntary act of the party over his own property, or because the property is supposed, by a fiction of law, to be attached to his person, and to be within his domicile, or because we are bound to do so by the comity of nations. Bankruptcy, said Lord Mansfield, in *Wadham v. Marlow*, (1 *H. Blacks.* 437. note. 8 *East*, 314.) is an act done by the bankrupt himself, and he is liable, on his covenant, for rent, equally, as if the assignment was voluntary, in contradistinction to its being required by law. Every man's assent is to be presumed to a statute. The same principle was advanced by Ch. J. Parsons, in *Goodwin v. Jones*, (3 *Tyng*, 517.) when he considered the assignment under the bankrupt laws, as the party's own act, since it was in execution of laws by which he was bound, and since he voluntarily committed the act which authorized the making of it. Voet (*Com. ad Pand.* 38. 17. 34.) states either of two grounds as sufficient for the rule of distribution of the intestate's effects, according to the law of his domicile; *vel quia semper domino presentia esse finguntur, vel de comitate, passim usu inter gentes recepta*. It is immaterial, for the present purpose, on which principle we give effect to the title of the foreign assignee. Either is a stable and sufficient ground, and has no application to the other question, whether the foreign certificate should cancel the debt of a creditor who is not a subject of the foreign government, and has given no assent to the proceeding.

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A voluntary assignment made *bona fide* by a debtor, of all his property, for the benefit of all his creditors, is valid, and will pass debts due to him in foreign countries.

So will an assignment under the bankrupt law of his country; either because it is equivalent to a voluntary assignment by the debtor; or because the domicile of the owner draws to his personal property; or because it is an established rule of comity among nations.

Every man is presumed to be assenting to, and a party to, the laws of his own country.

+ it

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The attachment act under which the plaintiffs derive their character as trustees of the *English* bankrupt, reaches to all the estate, real and personal, of the bankrupt; and creditors residing out of the state are specially declared to be creditors within the act. The provisions of it are very comprehensive; and I entertain no doubt, that if the attachment and appointment of trustees under this act, had been first in time, and the proceedings had been consummated, without any interruption or *supersedeas* on the part of the debtor, the title of the trustees would have been recognized in all the *English* Courts, as controlling the personal property there. In that case, the place of distribution of the funds would have been here, and not in *London*.

Observations
on the case of
Milne v. Moreton, decided
by the Su-
preme Court
of *Pennsylvania*.

During the examination of this question, I have not been inattentive to the case of *Milne v. Moreton*. (6 *Binney*, 383.) decided in the Supreme Court of *Pennsylvania*, in 1814, and which gave to their own attaching creditor a preference over the title of the *English* assignees, under a prior assignment. I have examined that case with great care, as well from respect to the character of the Court, as for the able discussion which it contains; and I can only be permitted to say, that from the view which I have taken, and the impressions which I have received of the law on the subject, it is not in my power to follow the conclusion of the majority of that Court. Considerable reliance seems to have been placed, in that case, upon the decision of the Supreme Court of the *United States*, in *Harrison v. Sterry*; (5 *Cranch*, 289.) and I am not disposed to controvert the position, that in the distribution of bankrupts' effects in this country, the *United States* are entitled to a preference; because, this preference is given by a positive law, and the attaching creditors were likewise entitled to a preference, if their attachment was prior to the assignment under the *British* commission. But the latter part of the decree touching the distribution of

And on the
case of *Harrison v. Sterry*, in the Supreme Court of the *United States*.

the surplus fund wants explanation; and we do not know the grounds of the decision. It is never, however, to be presumed, that any Court intends either to establish, or reject a litigated point of law, of great importance, merely by a dry decision, unaccompanied with argument or illustration.

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The case before me has one strong and peculiar feature. There was not only the ordinary and regular assignment by law under the *British* bankrupt system, but there was also a concurrent and separate assignment by the bankrupt to the same assignees, upon the like trust, of all his personal property "not being, arising, or growing in *England*;" and we have, therefore, the benefit of a voluntary assignment (as contradistinguished from that under the statute, and which operates in *invitum*) by the act of the bankrupt himself. This seems to have been done for greater caution, and to meet the difficulty that might arise as to the reception of the statute assignment, on this side of the *Atlantic*. This would seem to have removed every obstacle in the case. But I do not place much reliance on the distinction, and it does not appear to me to make any difference in the application of the principle, whether he made the transfer himself, or the law of his domicil for him. It is, in either case, in contemplation of law, his act. The act of bankruptcy was his act, and the law of his land, by which he was bound, operating upon that act, worked the transfer. There was, therefore, no longer any debt due to him in this state, upon which the subsequent title of the plaintiffs could attach.

A concurrent and separate assignment, made by the bankrupt to his assignees, upon the same trust as that made under the bankrupt law, of all property out of *England*, though it may strengthen the case of the foreign assignees here, makes no difference in the general doctrine.

The effect is the same, whether the transfer is made by himself, or by the law of his domicil, for him.

I am, accordingly, of opinion, that whether we consider the recovery of the debt in question under the foreign attachment, or the prior assignment of it with the property of the bankrupt under the *English* commission, the plaintiffs have no equitable claim to it, and the bill must, consequently, be dismissed. As the parties are all before the Court in

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a representative character, and have been litigating serious and important questions, without any imputation of misconduct, I shall dismiss the bill without costs.

Decrees accordingly.

NOURSE *against* PRIME, WARD, and SANDS.

The defendants, being stock and exchange brokers, in the course of their business, received of the plaintiff 430 shares of *United States'* bank stock, and which, it was agreed, in *February*, 1818, that they should hold, as collateral security for the payment of a note given to them by the plaintiff, for advances to him, and payable on the 10th of *January*. 1819, and that they should be at liberty, in case the note was not paid, at the time, to make immediate sale of the stock, accounting to the plaintiff for any surplus, and holding him responsible for any deficiency. The shares of the plaintiff were not marked or identified as his particular property, or kept separate and distinct, but were blended with the mass of shares of the same stock, held by the defendants, belonging to themselves, and in trust for others: *Held*, that as the defendants, at all times, since the giving of the note by the plaintiff, were possessed of shares standing in their names, and under their absolute and rightful control, and subject to no contract, to an amount far exceeding the number of the shares so deposited with them, by the plaintiff, and were ready and able, at any time, to transfer the 430 shares to the plaintiff, on payment of the note,—they were not bound to account to the plaintiff, for his stock, at the *highest prices*, at which shares were sold by them at any time during that period; but that the like number of shares, held by the defendants when the note became due, were to be considered as the shares so deposited by the plaintiff; and which the defendants were at liberty to sell according to the agreement, to reimburse the amount of the note, which remained unpaid.

June 29th and
July 19th.

THE defendants, who are stock and exchange brokers in the city of *New-York*, and had purchased shares of

United States' bank stock for the plaintiff, and had received a transfer of other shares for the plaintiff, making together four hundred and thirty shares in their hands. On the 6th of *February*, 1818, they rendered to the plaintiff a general account of their transactions, in which a balance was found due to them from the plaintiff, of 53,917 dollars, 15 cents, for which the plaintiff agreed to give his note to the defendants; and the plaintiff accordingly gave to the defendants his note for 54,200 dollars, including cash advanced to him, of 282 dollars, 95 cents, payable on the 10th of *January*, 1819, with interest at 7 per centum, payable half yearly. The defendants retained the 430 shares of stock in their hands, as collateral security for the payment of the note, and gave to the plaintiff a receipt, as follows: "We acknowledge to hold 430 shares of *United States'* bank stock, as collateral security for the payment of the said note, dated the 24th of *December* last, for 54,200 dollars, payable on the 10th of *January* next, with interest, at 7 per cent., &c. on the payment of which note and interest we engage to re-transfer the said 430 shares to the said *Charles L. Nourse*, or his order, accounting with him for the dividends that shall become payable on the same; and in case the note and interest are not duly paid, we are at liberty to make an immediate sale of the said shares, accounting with him for any surplus, and holding him responsible for any deficiency. *New-York*, 11th of *February*, 1818." The bill charged that the defendants did obtain or might have obtained certificates from some proper officer of the bank, distinguishing and identifying the said shares, as the proper shares of the plaintiff; and might and ought to have guarded against the casualties and misfortunes of trade, by endorsing the name of the plaintiff, or by putting some distinguishing mark on such certificates, designating the same as the property of the plaintiff, and to prevent the said shares from being mixed in a common fund with other shares of the *United States'* stock which the de-

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defendants may have held on their own account, or as trustees for others. The bill further charged, that the defendants, during the year 1818, having also in their hands a large number of shares of the said stock, held together in trust for various persons, and on their own accounts, and as agents for others, speculated in the said stock, by selling and buying shares, as the price in the market rose or fell, and did, at divers times, during the year 1818, sell all the said shares belonging to the plaintiff, at a great advance, without the knowledge or consent of the plaintiff, and received therefor, 65,600 dollars, &c.: and at one time during the said period, had not in their hands any shares of the said stock, or at least, not equal to the number of shares belonging to the plaintiff. That at the close of the year, when the price of the said stock had become greatly depressed, in order to realize the profit to themselves, on sales so made by them, in *breach of trust*, &c. they did, on the 14th of *December*, 1818, write to the plaintiff, that his note would fall due in *January*, and offering to extend the payment of forty-three thousand dollars of the amount, retaining the shares as their security, &c. The bill further charged, that the defendants could not exonerate themselves as trustees to the plaintiff and others, by alleging, that they would have replaced the 430 shares of the plaintiff, out of a common and mixed fund, which, by repeated breaches of trust committed against the plaintiff, they had rendered totally inadequate to the performance of the trusts committed to them, and with which that fund was connected, and could not have replaced the shares of the plaintiff, without committing similar breaches of trust towards some other persons. That if the defendants have mixed the shares of the plaintiff with other shares, or have neglected to take proper vouchers to identify the shares of the plaintiff, they have acted contrary to their duty as trustees, and subjected the plaintiff to the risk of losing his shares by their insolvency. That the defendants ought, therefore, to ac-

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count to the plaintiff for his 430 shares, at the highest rate at which the defendants may have sold any shares of the *United States'* bank stock, at any one or more times, since the 11th of *February*, 1818, amounting, in the whole, to 430 shares, as well as for the dividends which accrued on the shares so sold. That the defendants, on the 25th of *January*, 1819, sold, at the then depreciated value of the stock, 430 shares out of those of their own, held at that time, or which they may have purchased since the making of the note, for account of the plaintiff, and as and for his 430 shares; and have brought an action at law on the note, against the plaintiff, at *Boston*, where he resides, to recover the alleged deficiency between the amount of the note and interest, and the amount of the proceeds of such sale. *Prayer* for a discovery, and that the sale of the 25th of *January*, 1819, be declared null and void, as to the plaintiff, and that the defendants be restrained from further proceeding at law, on the note, &c.

The defendants, in their *answer*, stated, that the plaintiff, in *December*, 1817, urged the defendants to extend the time of credit for their advances, and proposed that they should have the entire control of the stock, and might use it in aid of their financial operations, and that his sole object was to secure to himself the benefit of the expected advance of price, by having a right to call on the defendants for the same number of shares, at the expiration of the proposed period of credit, which proposal was agreed to by the defendants. That it was not the practice of the defendants to take out *certificates* for shares of stock standing in their names, until they wanted to use them. And they denied that they ever did take any certificates to *identify* the 430 shares of the plaintiff, or were ever requested to do so. That the plaintiff well knew that, according to the course and practice of doing business in this respect, there was not any such identification of the shares. They denied, that they ever did sell, pledge, or otherwise dispose of the whole,

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and appropriations as the exigencies of their business and engagements required ; yet, it avers, that there was no time, during the year 1818, in which they were not possessed of shares standing in their own names, at their absolute and rightful control, subject to no contract of sale, to an amount far exceeding the shares deposited by the plaintiff ; nor was there any moment at which they would not have been ready, and willing, and able, and rightfully able, without any breach of trust to others, to have transferred the said shares to the plaintiff, upon payment of his note. What colour of equity, then, has the plaintiff to call on the defendants to account for the sale of the like amount of shares, at the highest price obtained during that year ? Nothing could be more unreasonable or unjust. The defendants were not bound to separate 430 shares from the common stock, and mark, or otherwise designate them as the separate property of the plaintiff, inasmuch as the plaintiff had left the shares undefined, and was content to take from the defendants a certificate to return, generally, " 430 shares of *United States*' bank stock." It is sufficient, under this contract, that the defendants always had the requisite quantity of shares on hand, and the law will presume that the shares so on hand, from time to time, *were the shares deposited*, because the parties have not reduced the shares to any more certainty. We must take the contract as we find it, and are not bound to enter into a labyrinth of inquiry and accounts to see if we cannot mend it. The plaintiff has no right to call for an account of the profits made on a like number of shares, when the defendants always had a sufficient quantity to comply with the contract, and when the plaintiff is not able to point out which were his shares.

Pothier, in one of his plain and familiar illustrations, supposes the case of a quantity of wheat deposited with another, and in a season of scarcity, the magistrate compels the bailee or creditor to bring that wheat to market, and sell it, he is then responsible for the price of it, which becomes a

substitute for the pledge in specie. This is obviously just and true ; but let us suppose that *A.* had acknowledged that he had 100 bushels of wheat received into his possession, belonging to *B.*, and which he held as a collateral security, and that the wheat had been mixed in, and constituted a part of one promiscuous heap of 1,000 bushels, in which *A.* was constantly trafficking, and that all this was in the view and knowledge of the parties, at the time ; would not *A.* have a right to continue buying and selling wheat, and be making constant additions to, and constant subtractions from that heap, *without being chargeable with selling the wheat of B.*, so long as he always had, at least, 100 bushels of like quality in his granary, subject to his disposition and control, and ready for *B.* whenever he had a right to demand it? Most certainly ; and if a person will suffer his property to go into a common mass, in this way, without having put a mark upon it, by which it can be identified, he clearly has no right to ask any thing more than that the quantity he put in should always be there, and ready for him. By just fiction of law, that *residuum* shall be presumed to be *the portion he put in*. It may as well be that as any other portion of the heap, and he has no right nor means to gainsay it.

Injunction dissolved.

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MINTURN
V.
SEYMOUR.

J. MINTURN *against* SEYMOUR.

Where the defendant, in his answer to an injunction bill, admits the equity of the bill, but sets up new matter of defence, on which he relies, the injunction will be continued to the hearing.

Equity will not enforce a mere *voluntary* agreement, not valid at law ; especially against a legal claim for a just debt, and where there is no consideration, nor accident or fraud.

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 MINTURN
 v.
 SEYMOUR.

June 30th,
 and July 20th.

BILL, filed *November 8, 1819*, stating, that in *September, 1814*, the defendant, at the request of the plaintiff, and *W. Minturn*, made a promissory note for 2,900 dollars, payable to them or order, which was discounted at the Bank of *New-York*, for the benefit of *J. & W. M.* That before the note became due, the plaintiff and *W. M.* failed, and the note was protested for non-payment. That, in *November, 1814*, finding that the defendant and several other creditors, were willing to release the plaintiff, *provided all the creditors would do so*; the plaintiff, with the advice of the defendant, had a release drawn up, which was signed by all the creditors of *J. & W. Minturn*, and among the rest, by the defendant. That this release was an absolute discharge of *J. & W. M.* from all debts and demands, and was so intended to be by the defendant, and the rest of the creditors; and was executed by the Bank of *New-York*, and the Merchants' Bank, under their *corporate seals*, though it was stated in the body of the instrument, to be "subscribed by our names," and was only *so signed*, by the individual creditors. That it was a mere mistake, and inadvertence, that *seals* were not affixed to their signatures. That, in *April, 1817*, the defendant brought an action at law in the Supreme Court, to recover the amount paid by him to the Bank of *New-York*, on the note. That the plaintiff, at the trial, offered the instrument above mentioned, signed by the defendant, in evidence, in bar; but not being under seal, it was decided not to be a *release*, and was rejected by the judge, and *averdict* was found in favour of *S.*, the plaintiff in that action, for 826 dollars and 69 cents. That, on a case made and argued, the Supreme Court afterwards gave judgment, on the verdict, for the plaintiff, *S.* (a) That the seals to the instrument were omitted by *mistake*; and that if the defendant intended, at the time, to release all demands on the plaintiff, in consequence of the note, and if he knew that a seal was necessary for that purpose, and omitted to affix it, it was a fraud on the plaintiff,

(a) Vide S. C. 17 *Johns. Rep.* 169—176.

and the banks who affixed their seals. *Prayer*, that the defendant may be compelled to affix his seal to the instrument, and for general relief; and for an injunction to restrain the defendant from taking out execution on the judgment so obtained at law.

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The *answer* of the defendant, filed *March 18, 1820*, which denied the material allegations in the bill, is substantially stated in the opinion delivered by the Court.

Bunner and S. Jones now moved to dissolve the injunction. They cited 1 *Ch. Rep.* 78. 84. 2 *Vent.* 365. 1 *Vern.* 37. 427. 1 *Ves. Jun.* 50. 1 *Fonbl. Equ.* 335—340. 3 *Burrow*, 1670. 7 *Term Rep.* 350. 13 *Ves.* 148. 4 *Johns. Rep.* 84. *Plowd.* 308 b. *Dyer*, 336 b.

June 30th.

Harison and T. A. Emmet, contra. They cited *Barnardist. Ch. Rep.* 373, 374.

THE CHANCELLOR. The answer denies all the equity of this bill. It is true, the answer endeavours to strengthen the defendant's case, by the introduction of new matter, and if the defence rested upon such new matter, and had admitted the equity set forth in the bill, then, according to the reason of the thing, and the general rule declared in *Allen v. Crob-roft*, (*Barnard. Ch. Rep.* 373.) the injunction ought to have been continued to the hearing. But in this case the equity of the bill is denied. That equity consisted in the averment, that the instrument set forth in the bill, was sealed with the corporate seals of the two banks, in consideration of a good and sufficient release and discharge of the plaintiff, executed by all the other creditors; and that the creditors separately consented to execute such a discharge, under the proviso, that all of them would consent to do it. The answer denies this averment, and every pretext on which it rests. It denies that the banks executed the instrument in consideration of any efficient discharge being given by the other

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creditors, or in consideration, that the discharge was a valid one, as to all the creditors who signed it. It states, that the instrument was signed by the creditors, individually, and by the two banks, among others, as they were respectively applied to, without any concert or mutual agreement, or condition, that other creditors should sign it. It was the voluntary and spontaneous act of each creditor, without any consideration. The answer thus meets and overthrows the charges in the bill, on which the special claim to the assistance of this Court was founded, and the case is reduced to this simple point, whether equity will enforce a mere voluntary agreement, not valid at law, and especially in destruction of a legal claim, and recovery for a just debt. A voluntary deed may be aided in special cases, as was mentioned in *Bunn v. Winthrop*, (1 Johns. Ch. Rep. 329.) but it is a clear, general rule, that a bill does not lie to enforce a mere voluntary agreement. The language of the books, from the earliest to the latest cases, is uniform in support of the doctrine, that a voluntary defective conveyance, which cannot operate at law, is not helped in equity, in favour of a volunteer, where there is no consideration, nor any accident or fraud in the case. To entitle the party to the aid of this Court, the instrument must be supported by a valuable consideration, or, at least, by what a Court of equity considers a meritorious consideration, as payment of debts, or making a provision for a wife or child. (*Pickering v. Keeling*, 1 Rep. in Ch. 78. *Thompson v. Attfield*, 1 Vern. 40. *Longdale v. Longdale*, 1 Vern. 456. *Colman v. Sarel*, 3 Bro. 12. 1 Ves. Jun. 50. and see also, 1 Fonb. 339. s. 2. and 1 *Mad-deck's Ch. Rep.* 564.)

In the present case, the defendant was a meritorious creditor, arising from the gratuitous loan to the plaintiff, of a negotiable note drawn by the defendant, at the plaintiff's request, and for his use, without any consideration; and he afterwards, when the plaintiff stopped payment, voluntarily, and without consideration, subscribed his name to an instru-

ment, releasing and discharging the plaintiff from all demands. Since the time of that signature, he has been obliged to pay the note he so gave to the plaintiff. He then called upon him, at law, for reimbursement and indemnity; and the instrument the defendant signed was found to be insufficient at law, to protect the plaintiff from that suit, and the defendant has recovered of the plaintiff, by verdict and judgment, at law. 'I did think, upon the statement in the bill, that the valid discharge, given by the two banks, was in consideration of a like valid discharge by the other creditors, and that, therefore, it would be an act of fraud upon those banks, for the defendant to refuse to make effectual his discharge.' But the answer shows that this part of the bill was not well founded, and the case, as it stands upon the pleadings, has no claim to the equitable assistance of the Court. I shall, consequently, dissolve the injunction.

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VAN VEGHTEN
V.
VAN VEGHTEN.

Injunction dissolved.

VAN VEGHTEN *against* D. VAN VEGHTEN.

The husband cannot file a bill against his wife for a divorce *à mensa et thoro*, on the ground of cruelty, desertion, or improper conduct. So, that, if in answer to a bill filed by the wife against the husband for a divorce, under the statute, on the ground of cruel treatment, the husband denies the charge, and sets up acts of cruel and abusive treatment on the part of the wife, and asks for a divorce, the bill will be dismissed.

The Court will not take notice of any consent or agreement of the parties to a divorce *à mensa et thoro*.

BILL by the wife against her husband, for a divorce *July 21st.*
a mensa et thoro, on a charge of cruel and inhuman treatment.

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VAN VEORTEN
v.
VAN VEERTEN.

The answer of the husband denied every substantial charge of improper conduct: and he recriminated, and charged the plaintiff with a series of acts of cruel and abusive treatment, and admitted that it would be proper, and intimated a strong desire that a divorce should be decreed.

The cause was set down for hearing, upon the bill and answer.

J. V. N. Yates, for the plaintiff.

I. Hamilton, contra.

THE CHANCELLOR. As the charges in the bill are denied, and not supported by proof, the foundation of the bill has failed. I cannot listen to the counter charges contained in the answer. The husband would not have been entitled to a divorce, even if such charges had been the ground of a bill exhibited by him, for that purpose. The statute authorizing a divorce from bed and board, for cruelty, desertion, or other improper conduct, applies only to a bill exhibited *on the part of the wife*. The common law has given to the husband sufficient power and control over the wife, to protect himself from such conduct. Nor can the Court take notice of any consent or desire of the defendant, in compliance with the wishes of the plaintiff, and make *that* the ground even of a qualified divorce from bed and board. It ought to be well understood, that the Court cannot lend its judicial aid and sanction to any such voluntary agreement. These qualified divorces from bed and board are dangerous enough, under all the checks and guards provided by any decree. The early *canons* of the church (*Burns, Eccle. Law*, tit. *Marriage*, ch. 11.) directed that parties so separated, should not only live chaste, and without forming any new matrimonial contract; but even that no sentence should be pronounced, *until security was given by the party requiring the decree, to obey this restraint*. The law regards

Divorces *a mensa et thoro*, ought to be checked, rather than encouraged.

the marriage contract as a stable and sacred contract, of natural, as well as of municipal law. It is a contract *juris gentium*, and parties cannot lawfully rid themselves of its duties, at the pleasure of either, or of both of them. If we except the *new* law of *France*, and the *new* law of *Prussia*, alluded to on a former occasion,* there is no such dangerous relaxation of the marriage tie, tolerated among the Christian nations. We must go in search of such loose notions of the obligation, to the half-civilized people of *Asia*, where polygamy prevails; and where, as a consequence of this evil, and as a branch of the same baneful policy, we shall find the prevalence of an almost unlimited freedom of divorce. (*Sale's Koran*, ch. 65. *Elphinstone's Caubul*, b. 2. ch. 3. *Institutes of Menu*, ch. 9. s. 122 to 126. *Colebrooke's Hindu Law*, vol. 2. p. 416 to 426. sect. 64 to 71. *Marsden's Sumatra*, p. 221 to 234. *Raffle's Hist. of Java*, vol. 1. 320. *Stanton's Ta-Ting-Leu-Lee*, sect. 116.)

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V.
SANDERS.

The contract of marriage is a stable and sacred contract of natural as well as of municipal law.

It is a contract *juris gentium*, and the parties cannot, at pleasure of either or both, get rid of the duties it imposes.

* *Ante*, p. 194.

Bill dismissed, without costs.

BURNETT and another, Administrators, &c. against SANDERS.

On a bill for discovery merely, the defendant is entitled to *costs*.

But where the plaintiff, who is entitled to discovery, goes first to the defendant, and asks for the information sought, which is refused, though in the power of the defendant, and the plaintiff is compelled to file a bill to obtain it, the defendant, though he answers fully, is not entitled to *costs*.

BILL for a discovery of payments, alleged to have been made by the intestate, on his bond to the defendant, and which bond was then in suit at law. The bill charged, that July 31st.

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v.
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on application to the defendant, she refused to admit the payments.

The answer admitted the most material of the payments, and that the plaintiffs, previously to filing the bill, had called on her to make such admission, which she refused, because the fact of the payment to her had then escaped her recollection; and she did not believe that they had been made, though she had since, upon search and inquiry, and examination of documents, changed her opinion.

G. W. Strong, for the defendant, moved to dissolve the injunction staying the suit at law, with the costs of the suit to be taxed.

Foot, contra, cited 1 *Madd. Tr. Ch.* 176. in opposition to the claim for costs.

THE CHANCELLOR dissolved the injunction, but without costs, as he thought this case formed an exception to the rule of practice, that when a plaintiff comes for a discovery, and obtains it, he shall pay the costs. Here the plaintiffs, who were *administrators*, first went to the defendant, and asked for an admission of certain specific payments, appearing from the accounts to have been made, and the defendant refused to give them the requisite satisfaction, and compelled them to come here for a discovery. As the payments were made to her, it was her duty to have ascertained the fact, and to have afforded to the plaintiffs the information she was, or ought to have been, accurately possessed of, in the first instance. She has no equitable claim to the costs of the suit; and the doctrine of *Mr. J. Buller*, when sitting for the Lord Chancellor, in *Weymouth v. Boyer*, (1 *Vesey*, jun. 416.) is very reasonable, and entirely applicable; and *Mr. Maddock* (*Tr. on the Pr. and Prac. in Chan.* vol. 1. 176.) says, he has heard Lord *Eldon* approve the doctrine.

Order accordingly.

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FRENCH and others *against* SHOTWELL.

Where a plaintiff asked for further time to except to the answer, which was granted; and, also, for leave to *amend* his bill, after such answer, and after a *plea* accompanying it, but not noticed for argument; the plaintiff, on being allowed to amend his bill, was ordered to pay *five dollars* for the *extra costs* of the further *answer*, and the *taxable costs* of the *plea*, in case it should become useless, in consequence of the bill being amended.

MOTION on the part of the plaintiffs, for further time to except to the answer, and for leave to amend the bill, after the said answer, and after a plea accompanying the same, but not noticed for argument. July 31st.

J. V. Henry, for the motion.

H. Bleecker, contra.

THE CHANCELLOR. The delay in excepting to the answer is sufficiently accounted for, and the plaintiff ought, therefore, to have time to except. To allow the bill to be amended in this stage of the cause, is according to the practice of the Court. (3 *Atk.* 370. *Newland's Pr.* 82. *Cooper's Tr. on Pl.* 333. 1 *Fowler's Ex. Pr.* 111. 112.) Both parts of the application must, therefore, be granted. If exceptions had been taken to the answer, and submitted to, or on reference, had been found well taken, then the plaintiff might have amended his bill, of course, *without costs*, according to the 15th rule of this Court. But here he comes before exceptions are actually taken, and if they should not be taken, or, if taken, overruled, the plaintiff ought to pay something to the defendant for the *extra costs* of putting in a further answer. The *English* rule is to require 20s. costs, in such

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cases. So, also, if the plea should be rendered useless by the amendments, the costs of that plea ought also to be paid. I shall, therefore, grant the rule, subject to the contingency of paying the taxable costs of the plea, in the one case, and five dollars for the *extra* costs of the further answer, in the other case.

The sum of five dollars is adopted, as nearly corresponding with the 20s. sterling, under the old *English* rule, and yet the relative value of stated sums is constantly varying. Even the 20s. sterling was deemed, a century ago, quite too small an allowance, and the costs were increased, in one case, by the additional allowance of 3*l*. (*Rowe v. Stuart, Dickens*, 58.) Lord *Thurlow*, in another case, allowed 40s. on such an amendment. But the smaller allowance is suited better to the state of our practice, and the moderation of its expense.

Order accordingly.

F. BRUSH against WILKINS and BRADISH, executors of J. BRUSH.

Subsequent marriage *and* birth of a child, are an implied revocation of a will, either of real or personal estate.

But such presumptive revocation may be rebutted by circumstances.

It seems that a subsequent marriage or subsequent birth of a child alone, will not amount to a revocation.

A will duly executed, but revoked by marriage, and the birth of a child, cannot be connected with a will subsequently made, but not executed with the requisite solemnities to pass real estate, so as to constitute a valid will; but the estate descends to the heir at law.

June 19th, and
August 1st.

ICHLABOD BRUSH, the testator, formerly of *Demara*, *South America*, but late of *Huntington*, in the county

of *Suffolk*, deceased, being seised of real and personal estate here and elsewhere, made his will, duly executed and attested, dated *March 6, 1807*, by which he directed, (1.) That his plantation, slaves, and effects, in the colony of *Demarara*, be sold by his executors: (2.) That his executors pay to Miss *E. Wilkins*, 20,000 dollars, in five annual payments, and in case of her death, to her parents: (3.) That they pay to the plaintiff, his sister, 500 dollars, annually, during her life. The testator, after making various other bequests, and giving the residuum of his estate to his brothers and sisters, appointed five executors, of whom the defendants, of the city of *New-York*, were two. In *June, 1808*, the testator married Miss *E. Wilkins*; and afterwards, made another will, dated *Huntington, March 14, 1809*, in which he revoked all former wills, and made various bequests and dispositions of his estate, different from those contained in his former will; giving to the plaintiff an annuity of 300 dollars, for life, and to his wife, jointly with the child of which she was then *enseint*, his estate at *Huntington, &c.*, and appointed the defendants, and two of the other persons, named in the former will, his executors, who were directed to sell his plantations, slaves, &c. in *D.* The testator died at *H.* the 1st of *August, 1809*, leaving one child; and the second will, subscribed by him, but not published in the presence of witnesses or attested, was found with the first will, sealed up in the same envelope, among his valuable papers. The defendants treated the first will as a nullity, and on the 22d of *August, 1809*, proved the second, as the testator's last will and testament; and no person proved or acted under the first will. The bill charged, that the defendants had possessed themselves of the personal estate of the testator, in this state, and in *Demarara*, and received the produce of the real estate; and *prayed* that the defendants might be decreed to set forth the situation, &c. of the real estate at *D.*, and the produce thereof, and to account with

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the plaintiff for the personal estate, and the income of the real estate, which had come to their hands, and pay to the plaintiff her annuity, and for general relief.

The defendants, in their answer, admitted that they proved the second will, and possessed themselves of the *personal* estate, and made an *inventory*, to which they referred, containing a just and true account of such personal estate; that they were advised, that the *slaves on the plantation* belonging to the testator in *D.*, by the laws of that colony, passed with the plantation as *immoveable* property; that the testator owed debts, beyond all the personal estate which had come to their knowledge, exclusive of that specifically bequeathed, unless the *plantation, slaves*, cattle, &c. in *D.*, were to be considered personal property; that the defendant, *W.*, had been appointed guardian of the person and estate of the infant son of the testator, and had received the rents and profits of the real estate, but they insisted that they were not accountable therefor except to the infant, or without his being made a party. They admitted, that if the plantation, slaves, &c. at *D.*, were to be deemed personal property, or if the real estate at *D.*, or the profits thereof, were to be charged with the payment of the annuity to the plaintiff, under the second will, there was sufficient to pay and secure it to her, but not otherwise, &c., and they set forth a schedule of the debts of the testator.

A witness was examined to prove the laws of *Demarara*, who deposed, that he was born in *D.*, and had resided there a considerable portion of the time, for the last ten years, and, for the last three years, was an officer in the Civil and Criminal Court of Justice of that colony, and was well acquainted with its laws. That by the laws of *D.*, slaves on the plantations are considered as attached to or part of them, and descended and passed with the plantation to the heir, (unless the plantation be duly devised) as real estate. That the same formalities are required to devise per-

sonal as real estate. That he did not consider himself qualified to give a correct answer, whether by the laws of *D.*, a will duly executed, becomes revoked by a subsequent marriage and birth of a child. That a will concerning real estate in *D.*, by a person residing in another country, and which was valid to pass real estate by the laws of such country, would be a valid will in *D.*, though not executed with the formalities required there. That by the laws of *D.*, a will must be executed by the testator in the presence of a notary; or in the presence of seven witnesses; or being executed without witnesses, be sealed up and delivered to the secretary or clerk of the Court, who indorses his signature and keeps the will.

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The cause came on to be heard on the pleadings and proofs. *June 19th.*

Boyd & Riggs for the plaintiff. They cited *Doug.* 38. *Burr.* 2171. 1 *Equ. Cas. Abr.* 413. 2 *Salk.* 593. note by *Evans.* 2 *East,* 541. 7 *Vesey,* 364. Sir *S. Romilly,* arguendo. 1 *Phillim. Rep.* 469.

Harrison, contra. He cited, *Amb.* 721. 5 *Term Rep.* 49. 4 *Maule & Selw.* 10. 1 *Phill. Rep.* 469. 2 *Atk.* 287. *Bynk. Observ. Jur. Rom. lib.* 2. c. 1, 2. 11. *Poth. Trait. des Donat. Testamen. c.* 6. s. 2. 1 *Dodson's Adm. Rep.* 263, *Demarara, &c.*

The cause stood over for consideration until this day. *August 1st.*

THE CHANCELLOR. (1.) The first question arising upon this case is, whether the will of the 6th of *March*, 1807, was revoked by operation of law, by reason of the subsequent marriage of the testator and birth of a son.

I am not apprized that the question has ever arisen and been decided in the Courts of this state; we are, then, to consider it as a case to be governed by the *English* law, as settled at the time of our revolution, or by those general prin-

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Implied revocations of wills are not within the statute of frauds.

Subsequent marriage and birth of a child are an implied revocation of a will.

And such revocations being presumptive merely, may be rebutted by circumstances.

First decided in 34 Car. II. in England, according to the opinion of Sir J. Nicholl, (2 Shower, 253.) as to personal property.

ciples of reason and justice, which have a uniform and universal application.

It had become a settled rule of law and equity, as early as the year 1775, that implied revocations of wills were not within the statute of frauds, and that *marriage* and *a child*, taken together, (though neither of them taken separately was sufficient,) did amount to an implied revocation, and that such presumptive revocations might be rebutted and controlled by circumstances. Without going minutely into all the cases, a cursory view of them will be sufficient to establish this position, and it can be shown to have received continued and unceasing sanction down to this day.

Sir John Nicholl says, that this rule was no part of the ancient jurisprudence of *England*, or of any other country, and that *Overbury v. Overbury*, (2 Show. 253) was the first case in which the rule was applied. That was a case before the delegates, upon appeal, in the 34th of *Charles II.* and it was adjudged that the subsequent birth of a child, was a revocation of a will of personal property; and this decision was expressly founded upon the doctrine of the civilians.

Civil law.

The civil law, in several instances, recognized these implied revocations.

Case stated by Cicero.

The case stated by *Cicero*, (*de Orat. lib. 1. c. 38.*) is often alluded to; in which a father, on the report of his son's death, appointed by will another person to be his heir, and his son returning, the case was brought before the *Centumviri*, and the son was reinstated in the inheritance. There

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is a like case mentioned in the *Pandects*, (*Dig. 28. 5. 92.*) in which the Prince set aside a will made upon a false rumour of the death of the person, whom the testator had previously appointed his heir. The decree was made on the petition of the person whom the testator had supposed to be dead; and it was made decidedly on the ground of giving effect to the real intention of the testator—*tamen ex voluntate testantis putavit Imperator ei subveniendum*. So, also, the subse-

quent birth of a child unnoticed in the will, annulled it; the doctrine was, *Testamenta rumpuntur agnatione posthumi*; and this is the rule in those countries which have generally adopted the civil law. (*Cic. de Orat.* 1. 57. *Inst.* 2. 13. 1. *Ferriere's Traduc. h. t. Huber. lib. 2. tit. 13. s. 5. de liberis exheredendis, et tit. 17. s. 1. Quibus modis testamenta infirmantur.*) The next *English* case was that of *Lugg v. Lugg*, (1 *Ld. Raym.* 441. *Salk.* 592.) decided by the delegates, of whom Ch. J. *Treby* was one, in which it was ruled that marriage and a child amounted to a revocation of a will of personal estate, founded on the presumption of a change in the testator's mind, from the alteration of his domestic circumstances and relations. It appears from the able and elaborate opinion of Dr. *Hay*, in *Shepherd v. Shepherd*, (5 *Term Rep.* 51. *note.*) that it had continued down to the year 1770, to be the uncontradicted and settled law of Doctors' Commons, that subsequent marriage and a child amounted to a revocation of a will.

In *Brown v. Thompson*, (1 *Eq. Ca. Abr.* 413. *pl.* 15. 1 *P. Wms.* 304. *note by Cox.*) the rule was adopted in the Court of Chancery, by the Master of the Rolls, Sir *John Trevor*, and applied to a devise of real estate. He held, that marriage and a posthumous child, were a revocation of a will of land. This decision was afterwards reversed, on appeal, by Lord Keeper *Wright*, who admitted the general rule; yet held that the case was controlled by the circumstance that the testator had devised his real estate in fee to his future wife, and thereby made provision for the wife, and through her, for his son Mr. *J. Buller*. (5 *Term Rep.* 61.) said, he had examined the register book, as to that case, and discovered the special reason which governed the Lord Keeper, which was, that after the testator's death, the wife had devised to the posthumous son and died, and so there was no injury to any person by the establishment of the will. But he thought, notwithstanding, that the decision at the Rolls

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was sound, and that the validity of the will ought not to have rested on the subsequent act of the wife.

The application of the rule of the civilians to wills of land, continued long after the case of *Brown v. Thompson*, to be a matter of doubt and hesitation in the Courts of law. Lord *Hardwicke*, in *Parsons v. Lanoë*, (1 *Vesey*, 189. *Amb.* 557.) cautiously withheld any opinion on the point; and Lord *Northington*, in *Jackson v. Hurlock*, (2 *Eden*. 283. *Amb.* 487) said, that the cases did not prove that marriage and the birth of a child would revoke a will of real estate. The distinction, however, between a will of real and personal estate, in respect to this doctrine of presumptive revocations, could not well be supported; and Lord *Mansfield* observed, in *Wellington v. Wellington*, (4 *Burr.* 2165.) that as it was settled that marriage and a child were a revocation of a will as to personal estate, he saw no ground of argument why the law should not be the same as to devises of land.

Marriage.
and birth of a
child, is a re-
vocation of a
will of the real
as well as of
the personal
estate.

This great question was at length finally and solemnly settled, in 1771, by the Court of Exchequer, in *Christopher v. Christopher*, (*Dick. Rep.* 445.) and it was adjudged by Ch. B. *Parker*, and two of his brethren, in opposition to the opinion of Baron *Perrot*, that marriage and a child were a revocation of a will of land. The case of *Spraage v. Stone*, (*Amb.* 721.) followed soon after, and the principle received, in that cause, the sanction of the most distinguished judges; and it has stood from that time to this day upon an immovable foundation. In that latter case, *Spraage* made a will in the island of *Jamaica*, in 1764, devising his real and personal estate. He afterwards married and had a son, and made a second will in *England*, giving all his estate to his wife, but this last will was unattested. The Court of Chancery in *Jamaica* decreed, that the marriage and son, together with the subsequent will, amounted to an implied revocation of the first will, so far only as related to the personal estate, and the first will, as to the real estate, was esta-

blished. On appeal, before the Lords of the Committee, at the Cockpit, consisting, among others, of *De Grey*, Ch. J. of the C. B., Sir *J. E. Wilmot*, late Ch. J. of the C. B., Sir *Thos. Parker*, late Ch. B. of the Exchequer, it was adjudged that the *Jamaica* decree be reversed, so far as it established the first will as to the real estate; and it was declared that the subsequent marriage and a son, were an implied revocation of the whole will of 1764, and that the real estate descended to the son as heir at law.

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This whole subject has continued to receive great discussion in the *English Courts*, since the æra of our revolution; and it has led to much refinement, and been accompanied with many distinctions, growing out of new cases constantly arising amidst the endless variety of human affairs. The principle established in the preceding cases has, however, remained perfectly unmoved.

In *Brady v. Cubitt*, (*Doug.* 31.) Lord *Mansfield* said, he did not recollect a case in which marriage and a child had been held to raise an implied revocation, where there was not a disposition of the whole estate; and all the judges agreed, in that case, that these implied revocations by a subsequent marriage and a child, might be rebutted by parol evidence. As to this latter point, I apprehend it will be found that the Courts have rather cautiously abstained from any decided opinion as to the admissibility of extrinsic evidence to rebut the presumption of revocation from the circumstance of the marriage and child, and this decision in *Douglas* has been repeatedly questioned. The K. B. in *Doe, ex dem. Lancashire, v. Lancashire*, (*5 Term Rep.* 49.) decided, upon very great deliberation, that marriage and the birth of a *posthumous* child, also, amounted to an implied revocation of a will of real estate. This was nothing more than the recognition of the very just and plain doctrine, that a *posthumous* child had equal rights, and was to be considered in the same situation, with a child born in the lifetime

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Lord Kenyon's explanation of the principle.

Lord Alvanley's opinion.

Case before Lord Loughborough.

of the father. But Lord *Kenyon* took occasion to observe, that the foundation of the principle of these implied revocations was a tacit condition annexed to the will, that the party does not then intend that it should take effect, if there should be a total change in the situation of his family.

The subject next came before the Master of the Rolls, in *Gibbons v. Caunt*, (4 *Vesey*, 848.) upon a new state of facts, and presented a case which had never been decided. There was a marriage prior to the will, and then the birth of children, by the first wife, after the execution of the will, and after the death of the wife, a subsequent marriage and no children. Lord *Alvanley* did not say the rule of decision would be the same, but he observed, that there was not a single argument that would not apply to the one case as much as to the other; and he showed the inclination of his mind to be in favour of the implied revocation. But he further observed, that "they do go the length of permitting evidence to be received against those implied revocations, and that he did not like it; and Lord *Kenyon*, in 5 *Term Rep.* did not form his opinion upon it."

A case under a new aspect next presented itself before Lord *Loughborough*, (5 *Vesey*, 663.) in which the question was, whether a will was revoked by marriage and the birth of a child, when the testator had, shortly before the marriage, by will, given the residue of his estate over, after having provided an annuity for the person with whom he then cohabited, and a large provision for the children he might thereafter have by her. He then married that person, and had several children by her. The Lord Chancellor thought the case new, and submitted it for the opinion of the Court of K. B. This is the case of *Kenebel v. Scrafton*, reported in 2 *East*, 530. The Court of K. B., after great consideration, decided, that the will was not revoked by the subsequent marriage and children, inasmuch as those new objects of duty were contemplated and duly provided for by the will. Lord *Ellenborough*, in delivering the opinion of

the Court, declared the rule to be settled, that marriage and a child, *without provision made for the objects of these relations*, operated a revocation of a will of lands; but that the rule only applied in cases where the wife and children were wholly unprovided for, and where there was an entire disposition of the whole estate, to their exclusion and prejudice. He approved of the ground of reason on which the doctrine of implied revocations was put by Lord *Kenyon*, and which was not a presumed alteration of intention, but a tacit condition annexed to the will when made, that it should not take effect, if there should be a total change in the situation of the testator's family. Here the wife and children were specifically contemplated and provided for, though under a different character and denomination. And we observe, that in this case, the Court cautiously withheld an opinion on the point, whether the revocation, where there was no such provision in the will, could be rebutted by subsequent parol declarations of the testator in favour of the will.

So, in the case *ex parte the Earl of Ilchester*, (7 *Vesey*, 348.) Lord *Eldon*, with the assistance of the Master of the Rolls, and the Ch. J. of the C. B., held, that a second marriage and the birth of a child, *the wife and children being provided for by the settlement*, and there being children by the former marriage, was a case of exception to the rule, that marriage and a child, operate a revocation of a will.

Another qualification of the general rule is to be found in *Sheath v. York*, (1 *Vesey and Bea.* 390.) A widower having a son and two daughters, devised his estate, real and personal, and then married, and had a daughter. The Ecclesiastical Court held the will to be revoked as to the personal estate; but Sir *Wm. Grant* thought that there was no ground to presume the will revoked, as to the real estate, upon any implied condition annexed to it, or upon any presumed change of intention, where the testator had already an heir apparent, and the revocation would be of no use to the subsequent child, who could not take the land. It might

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be revoked as to the personal estate, for that lets in the subsequent child, but he held, that it was not, in such case, revoked as to the land.

From this review of the cases, it would appear to be a general rule, incontrovertibly established, that marriage and a child, amount to a revocation of a will, either of real or personal estate. There are a number of exceptions to this rule, but not one of them applies to the present case. If the will of 1807 was to prevail, it would be repugnant to the doctrine in every decided case. Here is a total disposition of the whole estate, as respects the child. Here is wanting the accidental circumstance of a provision made by the mother for the child, which weighed with the Lord Keeper, in *Brown v. Thompson*. If this will was to prevail, it would be the case of an only child left entirely destitute, and without any provision, under a will of a man of large fortune, disposing of his whole estate. Nor can we derive any circumstance to rebut the necessary presumption of a revocation, from the subsequent unattested will, left in an envelope with the former will uncanceled. The presumption of revocation is increased by the second will, which begins with a declaration, that all former wills were revoked, and which makes provision for this same child, with which the mother was then *enseint*. If declarations of the testator be admissible, in any case, (and they were admitted by Sir John Nicholl, in the Ecclesiastical Court,) and if the evidence of circumstances is to be received, (and all the cases seem to agree in this,) here are decided circumstances to show that the testator did not intend to leave his son destitute. I have no hesitation, therefore, in declaring, that the will of March 6th, 1807, was revoked by the subsequent marriage, and the subsequent birth of a child.

It seems that the subsequent birth of a child alone, would not amount to a revocation.

It is unnecessary to consider, in this case, whether the subsequent birth of a child, without the additional circumstance of the subsequent marriage, would have been sufficient to revoke the will; yet I am not willing to quit

this subject, without taking some notice of the late case of *Johnston v. Johnston*, (1 *Phillimore*, 447.) decided by Sir *John Nicholl*, in 1817, in the Prerogative Court of Canterbury, in which that Judge, in a very elaborate and learned opinion, reviews all the cases, and adopts the rule of the civil law. He held, that it was not an essential ingredient in these implied revocations, that a subsequent marriage should concur with the subsequent birth of issue; and that the birth of a child, when accompanied with other circumstances, leaving no doubt of the testator's intention, was sufficient to revoke the will of a married man. The case before him was, indeed, enforced not only by the soundest principles of justice, but by the most persuasive equity. When the testator made his will he was married, and had two children living; and his will not only provided for them, but for a third child in *ventre de sa mere*. He lived twenty-two years afterwards, and his property had augmented from 20,000*l.* to 300,000*l.* sterling, and dying suddenly, he left three children, born after the will, wholly unprovided for, and one of the former children swept away the whole, as a residuary legatee. Such a case was almost too strong for any Court of justice, endowed with ordinary moral feelings and perceptions, to resist. He placed the doctrine of implied revocation, not where Lord *Kenyon* had placed it, on any tacit condition annexed to the will, but where Lord *Mansfield*, and (as I think) the civil law had placed it, on a presumed alteration of intention, arising from the occasion of new moral duties, which, in every age, and almost in every breast, have swayed the human affections and conduct. It was not the circumstance of marriage, (of which the civil law took no notice, in reference to this point,) but the birth of offspring, that laid the true and rational foundation of a presumed alteration of the testator's intention, and which intention constitutes the essence of every will.

It may be questionable, however, whether this last deci-

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sion has not carried the doctrine of revocation further than the *English* law will warrant. It appears to be in opposition to the decision in *Shepherd v. Shepherd*, already cited, and which was sent out of Chancery by Lord *Camden*, for the opinion of Sir *George Hay*; it was there held that the birth of a daughter and a son, after a former will making provision for the wife, and a child then in *esse*, was insufficient to revoke the will. The general reasoning on this subject, in favour of the revocation, is, that the testator having contracted new relations, such as those of husband or father, he must have intended a revocation of his prior will, because he must have meant to discharge the moral duties attached to those relations. The claim of the wife to the benefit of this presumption, in the case of a devise of land, is admitted not to be very strong, because, if she was let in, the land would still descend to the heir, and the law has secured to her, in every event, a provision for life, out of the real estate. Her claim to a provision from the personal estate, rests on higher ground: for, in respect to that portion of her husband's property, she is left entirely at the control of his will and pleasure; but her pretension is here also weakened, from the consideration of the provision by dower, which the common law has already secured to her. A stronger presumption of the testator's change of mind, arises from the birth of subsequent children; for, they cannot, like the wife, take care of themselves, by a suitable settlement, nor have they any fixed, unalienable provision, as the wife has, out of the real estate. They have, therefore, a very strong, natural, and moral claim to a competent support and provision, out of their father's property.

But the answer to this is, that the disposition of property is and ought to be governed by settled rules, and that according to the language and authority of the general current of cases, there must be both marriage and a child, to work a revocation of a will. It is the policy of the *English* law, to give to every man of competent will and understanding,

the absolute control (however imprudently or improvidently he may at times exercise it) over the disposition of his estate; and children are not considered as having a legal interest or property in the effects of the father. Our law has rejected, or has never adopted the notion of the *inofficiosum testamentum* of the civil law. It would be dangerous, and might lead to loose speculations, to give greater effect than the settled doctrine of the *English* law has already done, to the occurrence of new domestic duties. Every person is permitted to make his own will, at his discretion; and he may even disinherit his children, if he should be so inclined, whether they deserved, or not, such extreme chastisement. Every material addition to the property of a testator, or alteration in the circumstances of his family, varies his relations and duties, either in kind or degree, and might be made the ground of very plausible and pathetic claims upon the Court for the application of this doctrine of a presumed revocation. Courts would be running the hazard of substituting their will for that of the testator.

Indeed, Sir *John Nicholl* was not inclined to controvert the rule laid down by Sir *George Hay*, in *Shepherd v. Shepherd*, (*ubi sup.*) and by the K. B. in *White v Barford*, (4 *Maule and Selw.* 10.) that the mere subsequent birth of children, *unaccompanied by other circumstances*, did not amount to a presumed revocation; and it was the concurrence of the other circumstances rendering the intention "plain and without doubt," united with the birth of the children, that dictated the decree. If ever such a case, with equally pressing circumstances, should occur here, I should never dissent from that opinion willingly, nor without great difficulty and unaffected regret.

(2.) The first will being thus revoked, and rendered null and void, we have only to deal with this case under the second will, of the 14th *March*, 1809. If the first will be ab-

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A will duly executed, but revoked by marriage and birth of a child, cannot be connected with a subsequent will not executed with the requisite solemnity to pass real estate, so as to make a valid will; but the estate descends to the heir.

Foreign laws may be proved by witnesses, as matters of fact.

solutely revoked, there is no pretence for connecting the first will with the second, and holding the latter to be a mere modification of the former, and to be under its influence and control, according to what has been supposed to have been done by Lord *Hardwicke*, in *Brudenell v. Boughton*. (2 *Atk.* 268.) That case has no manner of application, and to connect the one will with the other, would be, *mortua jungere corpora vivis*. The first will is absolutely dead, at least, as to every thing that concerns the rights of the wife and child.

The will of 1809 was not executed with the solemnities requisite either by our law, or that of *Demarara*, to pass real estate, and so far the estate descended to the child, as heir at law, subject to the dower of the wife. It cannot admit of a doubt, upon the proof in the case, that the slaves and effects attached to the plantation in *Demarara*, passed as appurtenant to it, and as part of the plantation, to the heir. They, together with the plantation, were real estate, not reached, or affected, by the imperfect will of 1809. The law of *Demarara* on this point, has been proved, as a matter of fact, by a person acquainted with the laws of that place, and who had long resided there, and sustained a judicial office. If he was not a professed jurist, the plaintiff should have furnished more certain proof of the law of *Demarara*. (a) The evidence produced was competent, and, under the circumstances of the case, sufficient, in the absence of all other proof. I cannot judicially know the law of *Demarara*, but by proof, as a matter of fact. The claim of the plaintiff must then be confined to her legacy, under the last will; and the defendants are accountable for the personal estate which has come to their hands as executors, and they are not accountable to any further extent,

(a) It was understood in the case in *Dodson*, (1 *Dodr. Adm. Rep.* 228.) that by the positive law of *Demarara*, slaves on an estate were *gleba adscripti*, or attached to the soil, as part of the realty.

nor as executors, for the proceeds of the real estate, for those proceeds belong to the heir. The annuity given to the plaintiff, was, unfortunately, not made chargeable upon the *Demarara* estate, nor upon any other real estate. Other legacies in the will were chargeable upon the proceeds of the *Demarara* estate, but not the plaintiff's legacy. It is chargeable only upon the personal assets, subject to the debts, and to specific bequests. On this point, the answer of the defendants states, that the debts of the testator exceeded all the personal estate that has come to their hands, or knowledge, exclusive of the specific bequest. If this allegation be true, (and the plaintiff has not alleged or shown any thing against it,) there is no use to the plaintiff in directing an account, for there is a failure of assets, and the bill ought to be dismissed :

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The following decree was entered :

“ It is declared, that the will of the testator in the pleadings mentioned, of the date of the 6th of *March*, 1807, was, in judgment of law, revoked by the subsequent marriage of the testator and the birth of his son. That the will of the 14th of *March*, 1809, was not executed with the solemnities requisite to pass real estate, situated either in this state, or in *Demarara* ; and that the slaves and effects of the testator, attached to his plantation in *Demarara*, descended, together with the said plantation, upon the testator's death, to his son and heir at law, as part of his real estate. That the annuity given by the latter will to the plaintiff, was not charged upon any part of the testator's real estate, and the answer averring that the debts exceeded the assets which have come to the possession or knowledge of the defendants, as executors, exclusive of the specific bequests, and which debts and assets are set forth in schedules annexed to the answer ; It is ordered, &c. That unless the plaintiff shall, within forty days, elect to have an account taken before a master of the

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personal estate, and of the administration thereof, by the defendants, upon the principles contained in this decree, and the peril of costs, in case no monies shall be found due and coming to the plaintiff from the defendants upon such accounting, the bill shall then stand dismissed without costs."

NICOLL and VANDEWATER *against* MUMFORD.

The interest of each partner, in the partnership property, is his share in the surplus, subject to all partnership accounts, &c.

An assignee, therefore, or separate creditor, of one partner, is entitled only to the share of such partner, after a settlement of the accounts, and after all the just claims of the other partner are satisfied.

Ship owners are *tenants in common* of the vessel, not joint tenants, or partners; and one of them, where the vessel has been sold, knowing that the share of the other had been before lawfully assigned, has no right to possess himself of the whole proceeds, with a view to retain such share, to satisfy any claims he may have against the other.

The assignee of one part owner of a vessel, is entitled to his part or the proceeds thereof, without being subject to any general balance of account between the owners.

Owners of *freight* and cargo are joint tenants or partners, and the assignee or separate creditor of one of them takes his interest, subject to an account between him and his copartner in the voyage.

But where one joint owner of the freight and cargo of a particular vessel on a particular voyage, assigns his interest therein, one of them who has got possession of the whole proceeds, cannot retain the share so assigned, to satisfy claims he may have against the other, arising from former and distinct voyages or adventures, in which they may have been concerned together, in the same, or other vessels; they not being general partners in trade, and there not being any connection between the different voyages or adventures.

An insolvent debtor may, *bona fide*, assign his property before it has become bound by any lien, in *trust*, for the benefit of all his

creditors: and the assent of the creditors is not necessary to give legal validity to the deed.

But where the assignment is directly to the creditors, without the intervention of trustees, the assent of the creditors is requisite to give it legal validity.

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IN 1815 and 1816, the defendant, *Gurdon S. Mumford*, and *Samuel Stillwell*, were joint owners of the brig *Phoenix*, and her cargo, on a trading voyage to the *Mediterranean*, &c. After disposing of her outward cargo, which was shipped in the joint names of *Mumford* and *Stillwell*, and taking in another, the *Phoenix* went to the coast of *Brazil*, sold her cargo, and took in another, and arrived at the *Havana*, where the captain invested the proceeds arising from the sale of the brig, and of the last cargo, in sugar and coffee. *S.* having become insolvent, the defendant, who had heard of the arrival of the *Phoenix* at *H.*, in order to secure his claims against *S.* arising out of their joint concern in three other vessels, and voyages, and to indemnify himself for losses arising from his connection with *S.*, wrote to the master of the *Phoenix* at *H.*, directing him to consign the cargo, in which the proceeds arising from the sale of the brig and cargo at *H.* should be invested, to the defendant individually. The master, accordingly, and with the advice of merchants there, shipped the sugar and coffee so purchased with the proceeds of the brig and her cargo, on board the brig *Newton*, consigned to the defendant, at *New-York*, as if he was the sole owner. The *Newton* arrived at *New-York*, with the cargo, so consigned, to the defendant, on the 24th *February*, 1817; and the defendant entered the cargo at the Custom-House, took possession of it, and sold it, and applied the proceeds of *S.*'s share to the payment, as the defendant alleged, in his answer, of the debts of *Stillwell*. *Stillwell* had, on the 27th *April*, 1816, assigned all his estate, real and personal, according to a schedule annexed to the deed of assignment, including the

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brig *Phoenix* and her cargo, to the plaintiffs, in trust, for all his creditors. The bill alleged, that the defendant had notice of this assignment soon after it was executed, and long before the arrival of the *Newton* with her cargo. That the plaintiffs, relying on the assignment, and that the property would come to their hands, paid the debts of S. and, among the rest, bonds at the Custom House, to a large amount. That all the property assigned, including the cargo of the *Newton*, is insufficient to pay the Custom House bonds, and debts due to the other creditors of S. That the creditors of S. relying upon the assignment, and on the good faith with which it was made, pursuant to the stipulations contained in it, did, by an instrument executed by them, under their hands and seals, prior to the 1st of September, 1816, and annexed to that assignment, release and discharge S. from the debts owing to them respectively. That the plaintiffs have demanded the proportion of S. in the cargo sent by the *Newton*, and the proceeds, of the defendant, who has refused to deliver or pay to them any part thereof. The bill prayed, that the defendant might be decreed to account, &c. and pay over to the plaintiffs the one half of the proceeds of the brig *Phoenix* and cargo, &c. and for general relief.

The defendant, in his *answer*, admitted the material facts stated in the bill; and insisted on his right to retain the proceeds of the *Phoenix* and cargo, and to apply the proportion of S. to the payment of the amount due from S. to him, on the settlement of their partnership transactions; and he offered to come to an account and general settlement of all his dealings and transactions with S.

June 26th.

The cause, this day, came on to be heard on the pleadings and proofs.

Slosson and *C. Graham*, for the plaintiffs. They cited *2 Johns. Ch. Rep.* 144. *9 Johns. Rep.* 502. *Abbot* on

Ships, 82. 1 *Montague on Partnership*, 102. 181. 2 *Term*
Rep. 409. 1 *Campbell N. P. Rep.* 95.

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T. A. Emmet, contra. He cited *Cowp.* 405. 4 *Vesey*,
 396. 1 *Wightw. Rep.* 50.

The cause stood over for consideration to this day.

August 5th.

THE CHANCELLOR. The question, in this case, is, upon what principles the account between the parties shall be directed to be taken.

Stillwell and the defendant were equally concerned in the brig *Phoenix* and her cargo, and in the profit and loss of the voyage. There can be no doubt that the account is to be taken, as between partners, in respect to the freight and cargo; and the only difficulty is, as to the vessel. As far as the defendant and *S.* were to be considered partners, so far the defendant is to be deemed as having a lien on the partnership property, in respect to the balance that shall come due to him on the partnership account. No separate creditor of one partner can be entitled to more than the person in whose place he stands. He can only take his debtor's share after the other partner, *qua*-partner, is satisfied, and has had all just allowances for debts, expenses, and advances, in that character. The interest of each partner is his share of the surplus, subject to all partnership accounts; and that interest, or surplus only, is liable to the separate creditors of such partner, claiming either by assignment or under execution. As between one partner and the separate creditors of the other, they cannot affect the joint property any further than the partner, whose creditors they are, could have affected it. This is the settled rule in cases of partnership property, and the doctrine of Lord *Hardwicke*, in the leading case of *West v. Skip*, (1 *Vesey*, 239.) has received a constant sanction in succeeding cases. (*Fox v.*

An assignee or separate creditor of one partner is entitled only to the share of such partner, after a settlement of the accounts, and after all the just claims of the other partner are satisfied.

The interest of each partner is his share in the surplus, subject to all partnership accounts, &c.

And that interest alone is liable to the separate creditors of such partner, claiming either by assignment or execution.

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Hanbury, Cowp. 445. Field v. Clarke, 4 Vesey, 396. Dutton v. Morrison, 17 Vesey, 193.)

But a difficulty arises in the application of this doctrine to the vessel.

In *Doddington v. Hallet*, (1 *Vesey*, 497.) Lord *Hardwicke* so applied it, and held that part owners in a ship, were to be considered partners and joint owners, though they were, in fact, but tenants in common; and that the distribution of the assets of one of them, being insolvent, was to be made as if joint property, and to be applied first to the joint debts, and to be treated as partnership property, chargeable with all debts for which either owner was liable, on account of the ship. This case was expressly overruled by Lord *Eldon*, in the case *ex parte Young*, (2 *Ves.* and *Bea.* 242. 2 *Rose*, 76. note.) who held, that a ship stood upon the nice distinction of a tenancy in common. He ruled again, in the case *ex parte Harison*, (2 *Rose's Cases in Bankruptcy*, 76.) that the owners of a ship were not interested in it as joint tenants, but as tenants in common, and that the bankrupt's share passes to the creditors under the bankruptcy, without being liable, specifically, by way of lien, to the claims of the other part owners, in respect of their disbursements and liabilities for the ship. So, also, in the case *ex parte Gibson*, (1 *Montague on Partnership*, 102. note.) it was held, that a bankrupt's interest in the moiety of a vessel, was his separate property, and not held by his assignees, for the purpose of paying the joint creditors of the ship.

Ship owners
are tenants in
common, not
joint tenants.

This doctrine of a distinct separate property in a vessel between part owners, as tenants in common, seems to have had countenance from Lord *Loughborough*, in the case *ex parte Parry*, (5 *Vesey*, 575.) where one joint owner of a ship insured on his own account, and became a bankrupt. It was held, that though the cargo and proceeds of the voyage were joint property, the produce of the insurance on the ship which was lost, was separate property. And, perhaps, we may say, with Sir *Arthur Piggot*, that it is the

universal understanding in the commercial world, and especially among ship-owners, that part owners of a ship are not partners. He said, that the case of *Doddington v. Hallet*, was never acted upon; and the *English* usage is doubtless our usage upon this point.

I dare not, therefore, follow a case which has never had effect, and has been so authoritatively exploded. The late cases which have been referred to, are in point against the allowance of any partnership claim, or taking an account on the foot of any partnership in the vessel. And, as Mr. *Belt* has observed, (*Supplement to Vesey, senior*) in his notes on the case of *Doddington v. Hallet*, it was rather singular that Lord *Hardwicke* should have found a partnership of the ship, and each part owner liable *in solido*, for all advances, when the agreement stated in that case, expressly declared, that the parties agreed *severally, and not jointly, and each for himself*; and the short argument for the defendant, as reported in that case, states facts and principles which strike me as most weighty and conclusive on the question. The assignment then of S., of the 27th of *April*, 1816, and which was long before the *Phœnix* arrived at the *Havanna*, passed to the plaintiffs the right to a moiety of the vessel; and the defendant must be held accountable for that moiety, or the proceeds of it, which he has received, without making those proceeds subject to the balance which may be found due on a settlement of partnership accounts. The freight and the cargo are subject to such a balance, because as to them they were partners, but not as to the vessel. As to that, they were merely tenants in common, in like manner as if they had owned in common a warehouse, or other real property, in *New-York*.

The next question is, whether the freight and proceeds of the cargo of the *Phœnix*, are subject to the unsettled balance, (if any) due to the defendant on former joint transactions between him and S., in respect to the ships *Union* and *Orris*, and in voyages by those vessels on their joint account.

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Where one joint owner assigns his interest in the freight and cargo of a particular vessel, on a particular voyage, the other partner, who has got possession of the proceeds of such freight and cargo, is not entitled to be allowed and paid out of them, any claims he may have against his co-partner, arising from former and distinct voyages and adventures in which they were concerned together, in the same or other vessels; they not being general partners in trade, nor any connection existing between the different transactions or voyages.

This pretension on the part of the defendant is quite unfounded, because the case does not afford any evidence that the defendant and S. were general partners in trade, or had any other or further connection than what each separate adventure occasioned. A joint concern in the *Phoenix's* voyage, had no necessary connection with that of any former voyage; and to make the rule of law apply, limiting the assignees of S. to the surplus of the cargo and voyage of the *Phoenix*, after deducting the balance due the defendant on other transactions, it must distinctly and clearly appear that the concern in the cargo and voyage of the *Phoenix*, and of the former voyages and adventures, were all one, entire, subsisting, connected and continued partnership transaction. Nothing of that kind appears, or is to be inferred from the pleadings and proofs in the case. It appears by the answer, that the defendant owned only the one third of the *Phoenix* until a short time before her departure, and that S. owned the other two thirds. This inequality in that case, affords a strong presumption, that the parties had no fixed and settled connection as partners; and it was for the defendant to have made out the fact in proof, if it had existed.

If we put the suggestion of partnership out of view, then the defendant has no ground to retain the proceeds of one moiety of the *Phoenix*, in discharge of any general balance of accounts which he may claim and put forward by way of set-off. The right of S. to a moiety of the proceeds of the vessel and cargo, had been duly assigned to the plaintiffs in trust, for the benefit of all the creditors, and the defendant had no right, afterwards, with the knowledge of that fact, to take and appropriate those proceeds to himself. The right had vested in the assignees, in April, 1816, and most of the creditors, before September, 1816, had come in and released S. in consideration of the assignment, and of the dividends to be received. It is in proof that the defendant knew of that assignment before he wrote the letter to Captain Green, on the 13th September, 1816, requesting him

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to consign the entire cargo to him, the defendant, "to secure his advances on that and all other accounts." The defendant had no right, with or without the concurrence of Captain G.; to seize and take possession of the share of S., which had been lawfully transferred to and vested in the plaintiffs. It was a possession acquired wrongfully, against the act and deed of the true owner; and it would seem to be impossible, upon general principles of equal justice, or with safety, to credit and creditors in general, to give sanction to such a race of diligence, and such an act of unauthorized appropriation.

The fact of the assent of the creditors to the assignment, prior to the taking possession of the property by the defendant, may make the case more impressive, but I do not consider any express avowal of that assent as necessary to the operation of the assignment. It is settled by a series of cases, referred to in *Hendricks v. Robinson*, (2 Johns. Ch. Rep. 307, 308.) and to which may be added the cases of *Pickstock v. Lyster*, (3 Maule & Selwyn, 371.) and *Brown v. Minturn*, (2 Gallison, 557.) that an insolvent debtor may, at any time, before his property becomes bound by any lien, assign it over to trustees, for the benefit of all his creditors, by an act made *bona fide*. The assignment is to be referred to an act of duty, attached to his character of debtor, to make the fund available for the whole body of the creditors. In the case last cited, it was held that the assignment was good against a subsequent attachment, if the creditors had assented to the assignment prior to the attachment; and the inclination of the learned judge seemed to be in favour of the validity of the assignment, even without such intervening assent, and which, I apprehend, is not indispensable. If the assignment was directly to the creditors, their assent would be necessary to give validity, in law, to the deed. But if the assignment (as in this case) be to trustees, for their use, the legal estate passes and vests in the trustees, and Chancery will compel the execution of the trust for the benefit of the

An insolvent debtor may, *bona fide*, assign his property in trust for the benefit of all his creditors; and the assent of the creditors is not necessary to give legal validity to the deed.

But if the assignment is directly to the creditors, their assent is necessary to give it legal validity.

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creditors, though they be not, at the time, assenting, and parties to the conveyance. This point was not necessary for decision in that case; but as far as the case went, it is equal to any other, in point of authority, derived, most justly, from the character of the judge, and the very able and accurate investigation by which his decisions are distinguished.

I shall, accordingly, direct a reference, to take and state an account; and that, in taking the account, the defendant be charged with the net proceeds of one moiety of the brig *Phoenix*, sold at *Havana*, and with one moiety of the net proceeds of her freight and cargo, upon the voyage, in the pleadings stated, or so much (if any) of such moiety of the freight and cargo as shall appear due to the plaintiffs, as assignees of *S.*, after deducting the balance that may be found due to the defendant, from *S.*, on a settlement of accounts between them, in respect to their joint concern in the said freight and cargo and voyage of the *Phoenix*; and all further questions are reserved.

Decree accordingly.

Revised in part & modified
20 Johns 64-637

SCRIBNER against HICKOK and others.

On a bill filed by the mortgagor, to redeem, against the administrators of the mortgagee in possession, and others claiming under him, the defendants were decreed to pay to the plaintiff a certain sum for the rents and profits of the land, after deducting the mortgage debt; and the decree being silent as to the proportions which each defendant was to pay, one of the defendants paid the whole sum to the plaintiff, who gave him liberty to make use of the decree, to reimburse himself the amount: *held*, that he could use the decree only for his protection and indemnity, so far as his co-defendants were bound to contribute.

And the Court, on petition and motion of a co-defendant, directed the contribution to be enforced under the decree, so far only as the right was clearly ascertained.

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HICKOK.

August 5th.

THE plaintiff, as mortgagor, filed a bill to redeem against *James Hickok* and *Horatio Hickok*, administrators of *Ezra Hickok*, the mortgagee, deceased, and *Daniel Hickok*, *Daniel Boardman*, and *Stephen Brayton*.

On the 22d July, 1812, the Master's report, as to the amount of the rents and profits of the mortgaged premises, received since the mortgagee took possession, after deducting the debt of *Ezra Hickok*, the mortgagee, was confirmed, and the defendants, who were either administrators of the mortgagee, or assignees, under him, of the land, were decreed to pay to the plaintiff 4,287 dollars and 1 cent. On the 20th of October following, the defendant, *Horatio Hickok*, who was one of the administrators of the mortgagee, satisfied the plaintiff, paying him 4,050 dollars, and obtained the consent of the plaintiff's solicitor to use the decree to reimburse himself. It appeared that *H. Hickok* paid the plaintiff to prevent an impending execution; and he paid it out of his individual funds, though it appeared, by the affidavit of the defendant, *J. Hickok*, the other administrator, that he advanced about 1,000 dollars to *H. Hickok* for the purpose. An execution having been issued, at the instance of *H. Hickok*, against the defendant, *D. Boardman*, for the whole amount of the decree, and levied on his property, he obtained an order from Mr. Chancellor *Lansing*, on the 20th of April, 1813, staying the execution until further order.

A petition was now presented by *H. Hickok*, praying that the order of the 20th of April, 1813, might be vacated; and it appeared, from the documents and affidavits produced, at the hearing of the motion upon the petition, that *Ezra Hickok*, the mortgagee, took none of the rents and profits to himself, but had assigned his right and interest in

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the premises to the defendants, *D. Hickok* and *D. Boardman*, and that they and *Stephen Brayton*, who had purchased under one of them, had received all the rents and profits, in unequal proportions.

It appeared that the defendant, *D. Boardman*, had received, at least, a moiety of the rents and profits.

J. V. Henry, for *H. Hickok*, the petitioner.

A. Van Vechten, contra, for the defendant, *D. Boardman*.

THE CHANCELLOR considered that the defendant, *H. Hickok*, was not entitled to be deemed a purchaser, for himself, of the decree, and to use it as if he stood in the character of a stranger to the parties, but as having satisfied it, as one of the defendants, on behalf of the estate of *E. Hickok*, deceased; and was entitled only to indemnity or contribution, as a co-defendant, from the other defendants. The defendant who had paid more than his due proportion, or who had paid the whole, when the same ought to be borne by the co-defendants, or some of them, was entitled to stand in the place of the plaintiff, and to use the decree for his protection and indemnity, so far as it clearly and certainly appeared that the other defendants ought to contribute. (2 *Vesey*, 622. 1 *Wightw.* 2, 3. 6. 2 *Maddock's Ch. Rep.* 437. 11 *Vesey*, 22. 3 *Merivale*, 576. 1 *Atk.* 133. 2 *Vern.* 609.) Perhaps it would have been proper to have designated, in the original decree, the proportions of the sum decreed to the plaintiff, to be levied on the defendants respectively; but as that was not done, the right of contribution was to be enforced, upon this motion, so far only as that right had been clearly ascertained.

The following order was entered:—"That, inasmuch as the decree of the twenty-second of July, in the year one thousand eight hundred and twelve, directing the payment

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to the plaintiff of four thousand two hundred and eighty-seven dollars and one cent, with interest, from the fifteenth of January preceding, was directly and equally against all the said defendants, without discrimination, and the payment to the complainant of four thousand and fifty dollars, by the defendant *H. H.*, in satisfaction of that decree, under the circumstances of the case, and the proofs produced, is to be considered, not as a purchase by him in his own right, but as a payment by him in trust, and in his representative character, as one of the administrators of *Ezra Hickok*, deceased, for the benefit of that estate, and entitling him to contribution or indemnity, only in the character of a co-defendant, equally bound by the decree: And *inasmuch*, as it appears that the defendant, *D. Boardman*, was not bound, in equity to contribute to the said payment, but in a rateable proportion with such others of the co-defendants as were partakers, with him, of the rents and profits of the mortgaged premises; and that he is not to be deemed answerable to the said *H. H.* for the entire proportions of the said payment, which the other defendants, *Daniel Hickok* and *Stephen Brayton*, or either of them, were, in equity, bound to contribute; and it appearing upon this motion, that the said *Boardman* received, at least, a moiety of the said rents and profits, and is in equity bound to contribute a moiety of the payment so made by the said *H. H.*, and it not appearing, with sufficient certainty, how much more, if any, he ought to contribute—*It is thereupon ORDERED*, that unless the defendant, *Daniel Boardman*, within sixty days, bring into Court, and deposit with the register, for the use of the defendant, *H. H.*, two thousand and twenty-five dollars, with interest thereon, from the twentieth of *October*, one thousand eight hundred and twelve, that then the said motion be granted, so far as to allow the defendant, *H. H.*, to levy and collect the said last mentioned sum, with the interest thereon, as aforesaid, and no more, from the said defendant:

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and it is further declared, that nothing in this order contained, shall be deemed to prejudice the right of the said H. H., (if any he has,) to a suit in this Court, by bill, for any further or greater contribution from the said D. B."

CAMPBELL and others against MACOMB and others.

If mortgaged premises are incapable of being sold in parcels, or of being divided, without injury, the whole may be sold, though the whole of the debt is not due; and the proceeds applied to pay the interest and costs, and the surplus to the discharge of the principal of the debt.

Where, in such case, the bond having become forfeited at law, for the non-payment of the interest, the whole mortgaged premises are decreed to be sold, and the mortgagor, or the purchaser of the equity of redemption, before the day of sale, pays the interest and costs, the sale will be stayed; but the decree of foreclosure entered, will remain as further security, to enforce the payment of the future interest, and the instalments of the principal, as they respectively become due.

Though the mortgagee is not only a trustee, but a surety for the debt, and though the mortgaged premises are in a state of ruin and decay, in consequence of storms, and the security thereby impaired, and rendered precarious, he is not, therefore, entitled to have the property sold, before the debt is due, or the debtor is in default.

Nor will this Court, where the premises, being a dam and bridge, were injured by storms, interfere to compel the mortgagor in possession, to repair them at his own expense.

August 7th.

A DECREE was entered in this case, on the 13th of June, 1820, on the coming in of the Master's report, [by which it appeared, that there was due to the plaintiffs, as trustees of a charity school, on two bonds and mortgages in the pleadings mentioned, for interest, 1,575 dollars. That the principal of the said bonds, being in the whole, 10,000 dollars, would not be due until the year 1825, but the bonds

had become forfeited at law, by the non-payment of interest, and that there was due to the plaintiff, *Campbell*, 27,499 dollars 99 cents, on two judgments, and that the mortgaged premises were manifestly indivisible, and could not be sold in parcels,] that the mortgaged premises, being a stone dam, and bridge, across *Harlaem* river, he sold, and that the proceeds be applied to discharge the costs of suit, and then the interest due, and then the principal of the said bonds and mortgages, though not due, and the residue, if any, towards payment of the two judgments in favour of the plaintiff, *Campbell*. Before the day of sale, *John Mowatt*, jun. the purchaser of the equity of redemption, belonging to the two mortgages, paid all the arrears of interest, and the costs due, and an order was entered, upon his application, staying the sale.

A petition was now presented, on the part of the plaintiff, *Campbell*, stating, that he is personally bound, as collateral security, to the trustees of the charity school, for the payment of the bonds and mortgages. That he holds two judgments against the defendant, *Macomb*, for moneys advanced, and for his indemnity as such security. That the other defendants were owners of the equity of redemption. That *Macomb* is insolvent, and the dam much injured by a storm, since the filing of the bill, and now in danger of being destroyed. That the security for the principal of the mortgage debts, is much impaired. That the defendants, who were then owners of the equity of redemption, agreed to the decree of sale. The petitioner concluded with a prayer, that the defendant, *Macomb*, or *Mowatt*, be ordered to give security to repair the dam, or to repay the mortgage debt with interest, or that the order staying the sale be vacated.

J. I. Roosevelt, jun. for the motion, on behalf of the petitioner.

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J. Smith, contra. He read an affidavit of the defendant *Macomb*, stating, that *Mowatt*, the present owner of the equity of redemption, was rebuilding the dam, and would, probably, finish it in two months.

THE CHANCELLOR. The sale of the whole of the mortgaged premises was indispensable in this case, because they were not capable of being sold in parcels, or of being divided, without manifest injury to all the parties concerned. When the whole premises are thus necessarily sold, it is the direction of the statute, (1 N. R. L. 490.) that *the Court apply the proceeds of the sale not only in payment of the interest, instalment, or portion due, but towards payment of the whole, or residue of the demand, which hath not become due, or payable, provided the same bears interest.* But this provision is made for the necessity of the case, and more than is due is not to be raised out of the mortgaged premises, when that necessity does not exist. If the mortgagor, or the party holding the equity of redemption, comes before the sale, and brings in the amount due, with costs, there is no justice or equity in suffering the sale to proceed. It has been the practice of the Court, since I have sat here, to stay the sale in such cases, and to let the decree of foreclosure remain good to enforce payment of the future interest and instalments, as they may respectively become due. When such an application was made, before answer, in *Lansing v. Capron*, (1 Johns. Ch. Rep. 617.) I required, as a condition of the rule, a decree of foreclosure to be entered by way of security, and to save the trouble and expense of a new suit; but this is the utmost length to which any proceeding in the cause has been carried, after payment of the amount due, with the costs.

Though there be a regular decree of sale in this case, there can be no doubt of an adequate power in the Court, in its discretion, to regulate the process of execution under the decree. To sell, after satisfaction of the decree, would

be gross abuse ; and the whole inducement to the sale is to obtain satisfaction of the sum *actually due*. The object of the decree was not to raise any part of the debt not due ; yet, the raising of the entire debt may become an unavoidable consequence of the sale, because, the Court, in order to raise what is due, is obliged to sell the whole of the mortgaged premises, as they happen to consist of one entire subject, incapable of being conveniently, or safely divided. If this necessity can be avoided, before the sale, by the voluntary payment of what is due, the present object of the decree is satisfied, and all that the party can, in conscience, require, is, that it may remain as a security, for subsequent defaults, and afford him an easy and prompt remedy, when they occur.

A Court of law, after judgment and execution for the entire debt, will relieve the defendant, on paying the instalment due, but will retain the judgment as a security for the future instalments. (*Judd v. Evans*, 6 Term Rep. 399.) This is an equitable construction of the statute of 4 Anne ; and surely this Court will not turn a deaf ear to the equity of the case, and adopt a more than common law rigour.

But the petition states, that the petitioner is not only a mortgagee in trust, but a surety for the mortgagor, and that the mortgaged premises are in a state of injury and decay, from the action of storms, and have thereby become a precarious security. I do not perceive that this circumstance gives him any right or title, in equity, to have the premises sold for a debt not due. The security was taken with knowledge of the situation and character of the property, and of the risks to which it was exposed. It does not belong to the Court to give a party better security than he elected to take, where there has been no fraud or mistake, nor any abuse or waste of the subject. I am not informed that there exists any precedent of a bill *quia timet*, adapted to such a case.

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All the cases in the *English* law, in which even a surety may file a bill *quia timet*, are those in which the debt was due from the principal debtor; and I do not know of any principle of equity that will justify us in giving aid to the surety, before the debt is due, when the parties have not provided, in their contract, for such a case.

The question on this subject, so often raised in the civil law, assumed the fact, that the principal debtor was in default; *Si diu in solutione reus cessavit*; and when it is added, *aut certe bona sua dissipavit*, the reference was still to the case in which the debtor had failed to pay, and was, also, wasting his goods. I apprehend, this must be the true construction; for the only question raised by *Marcellus*, in the text referred to, (*Dig.* 17. 1. 38. 1.) was, whether the surety could seek indemnity before he had himself paid, *fide jussor an et prius, quam solvat, agere possit, ut liberetur?*

By the civil law, a surety cannot sue the principal debtor for his indemnity or discharge, before the term of payment given to the debtor, by his contract with the creditor, has expired; though the surety may, after the time of payment has elapsed, sue the debtor for his indemnity, in certain cases, before he has himself paid the debt.

It was a very equitable provision in the civil law, to afford a remedy to the surety when the debtor neglected to pay, though the creditor had not required payment, and though the surety had not actually advanced the debt; but it would not have been very just to have given the surety an action for indemnity against the debtor, before the latter was in default, and when such a previous claim made no part of the original contract. The debtor, as the civil law truly observes, in another place, (*Dig.* lib. 17. 1. 22. 1.) has an interest not to be compelled to pay before the day; and yet, I perceive, that several writers on the civil law (*Domat.* part 1. b. 3. tit. 4. sec. 3. n. 3. *Wood's Institutes of the Civil Law*, p. 227. *Brown's Lectures on the Civil Law*, vol. 1. 362.) (a) refer to this very text to prove, that if the surety be

(a) There must be some misapprehension of the meaning of the text, on the part of these writers, or the opinion of *Marcellus*, (*Dig.* lib. 17. tit. 1. 38.) to which they refer, is irreconcilable with principles laid down in other parts of the Digest. In the case stated in the text, *Titius* was part owner of a house, which, by his consent, was mortgaged to the creditor of his natural son *Marius*. *Marius* died, and the question which

in peril, he may sue *before the time of payment*, to be indemnified or discharged. It may be so, but these writers refer to no other text but that already cited, and that certainly does not, by any necessary interpretation, warrant the doctrine. Indeed, it seems to preclude it, because the remedy was intended, or provided, (and so it is expressed,) especially for the case of a surety who could not conveniently discharge the debt himself, and have his regular recourse over, at once, by the action of *mandatum*. It was a benevolent provision, in that view, and just in no other. In other

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arose between *Titius* and the guardians of the orphan child of *Mavius*, was, whether the part of the house so pledged, could be exonerated; there being, as it would seem, no time fixed, by the agreement of the parties, for that purpose. "It is not unlike," says *Marcellus*, "the question so frequently agitated, whether a surety, even before he has paid the debt, can demand to be discharged? He is not obliged," he answers, "to wait until he has paid the debt, or a judgment is given against him, if the debtor has delayed payment a long time, or is wasting his estate; especially, if the surety has not got the money, by the payment of which, to the creditor, he would be entitled to his action, *ex mandato*, against the principal." [*Non absimilis illa quæ frequentissime agitari solet, fidejussor an et prius, quam solvat, agere possit, ut liberetur? Nec tamen semper exspectandum est, ut solvat, aut judicio accepto condemnatur, si diu in solutione reus cessavit, aut certe bona sua dissipavit: præsertim si domi pecuniam fidejussor non habebit, qua numerata creditori mandati actione conveniat.*] *Marcellus* either refers to the case where no day of payment is fixed, and then it is an exception to the general rule, and left to the discretion of the Judge, to be decided according to the circumstances of the case, or to a case where the day of payment was passed; otherwise, the surety, by paying the debt, could not have an action *ex mandato*, against his principal; for, until the surety has paid, and the principal is in default, the implied or *quasi* contract, *ex mandato*, could not arise between them. If the creditor cannot sue the debtor before the day of payment, the surety, whose obligation is accessory merely, can have no better right. Accordingly, *Javolenus* says, (*Dig.* 17. 1. 51.) "though the surety, by mistake, pays the money before the day, he can neither have an action to recover it back, nor an action *ex mandato*, against the debtor, before the day of payment arrives." [*Fidejussor, quamvis per errorem ante diem pecuniam solverit, petere (repetere) tamen ab eo non potest: ac ne mandati quidem actionem; antequam dies solvendi veniat, cum reo habebit.*]

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parts of the *Pandects*, (*Dig.* 17. 1. 22. 1. and 46. 1. 31.) *Paul* and *Ulpian* lay down a rule, in respect to sureties, in perfect accordance with the construction I have ventured to adopt, for they say, that if the surety pays before the day, he cannot have recourse over to the debtor until the day of payment has arrived. A number of civilians who have very fully discussed the rights and remedies of sureties under the civil law, and always with this text of *Marcellus* in view, give us no intimation of such a doctrine. The general rule of the civil law was, that the action by the surety against his principal, depended upon his having paid the creditor, (*Inst.* 3. 21. 6. and *Ferriere's Inst.* h. t.) and the cases in which he might have recourse over, before payment, were all special cases, as where judgment had already passed against the surety, or the debtor was in failing circumstances, or such a recourse over was part of the original contract, or the debtor had neglected a long time, as from three to ten years, to pay, or the creditor to demand. In all these excepted cases, the surety might sue the debtor for his indemnity or discharge; but *when* might he sue him? Not before the debt was due and payable to the creditor, but before the surety had paid the creditor. The authorities to which I now refer, (*Hub. Prælec.* lib. 3. tit. 21. *De Fide Jussoribus*, 11. *Voet ad Pand.* lib. 46. tit. 1. 34. *Pothier, Trait. des Oblig.* n. 441. *Ersk. Inst.* b. 3. c. 65.) all consider these exceptions as only providing for the relief of the surety, *ante solutionem*. He may sue the principal debtor before he has actually paid the debt, and the exceptions were to relieve him from *that* burden, for without one of these special causes, says the *Code*, there would be no foundation, before payment, for the action of *mandatum*. (*Nulla juris ratione, antequam satis creditori pro ea feceris, eum ad solutionem urgeri certum est.* *Code* 4. 35. 10.) This plain and equitable principle, that until the debtor is in default, either in his contract with the creditor, or in his contract

with the surety, he is not bound to pay or indemnify, seems to pervade equally every part of the civil law.

Pothier says, (*ubi sup.* n. 442.) that if the obligation to which the surety has acceded, must, from its nature, exist a long time, as if he was surety for the due execution of a trust, he cannot, within the time, sue the principal debtor or trustee for his discharge, *for he knew, or ought to have known, the nature of the obligation he contracted.* Though where he is surety, indefinitely, as for payment of an annuity, he may, after a long time, as, say ten years, demand that the principal debtor liberate him, by redeeming the annuity.

I cannot make it a condition of the order, staying the sale, that the defendant should repair the dam. This would be a very extraordinary and dangerous interference with the exercise of the rights of a mortgagor, and is, in practice, unknown. Suppose, the most valuable part of the mortgaged premises should consist of buildings, and they should accidentally be destroyed by fire, can the mortgagor be compelled immediately to rebuild? Is it not rather incumbent on the mortgagee, or the surety, to provide for such a case in the contract, or by insurance? It would bring distress and ruin on a mortgagor, to charge him with burdens and duties, not within the contemplation of his contract, and, therefore, not within his provident foresight. How far the Court could, or ought to interfere, in a case of negligent, or permissive waste, rapidly impairing the security, is a question which need not now be discussed; for the relief, if any, would not be by directing the mortgaged premises to be sold for a debt not due, or, under a decree of sale, to give an order to repair, or a reference to assess damages. The necessity of any interference, of any kind, in cases of mortgages, is exceedingly diminished by the consideration, that the mortgagee can, if he pleases, relieve himself, by obtaining possession of the land, and make, at his own expense, the requisite repairs, for which he would be allow-

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but to

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ed, in account, when the mortgagor came to redeem. It is, also, stated, in this case, that the present owner of the equity of redemption is in the act of repairing the dam; and it is so evidently his interest to do it, and his payment of the interest due on the mortgage, together with the costs, is such decisive evidence, that the property is considered to be worth more than the debt charged thereon, that I should infer there was little or no foundation for the alarm discovered in the petition.

Motion denied, with costs.

LAWRENCE *against* CORNELL and others.

On the sale of premises, under two mortgages, it was represented, that the property was free from all incumbrances; but after the sale, and the Master's report, it was discovered, that the property was subject to a city assessment and tax; and the purchaser, therefore, refused to complete the purchase, unless the incumbrances were removed. The Court, the facts being satisfactorily proved, directed the master to discharge the incumbrances out of the proceeds of the sale.

August 8th.

PETITION of the plaintiff, stating a decree for the sale of mortgaged premises, lying in the city of *New-York*, to satisfy the mortgage debt due to the plaintiff, and a junior mortgage held by one of the defendants, and a sale thereon, by a Master, in pursuance of the decree, to *William Reynolds*, for 2,550 dollars. That, at the time of the sale, the premises were represented as free and clear from all incumbrances. That since the sale, the plaintiff has discovered that there was a city assessment upon the lot, amounting, on the 1st of *March* last, to 300 dollars and 31 cents, and that the premises were, on that day, sold to *John W. Richardson*,

for the term of four years, in discharge of the assessment; and, also, that the premises were charged with a city tax of 13 dollars and 76 cents, payable on the 1st of *October*, 1819, which sum bears interest from that day, at the rate of 14 per cent. That *Reynolds*, the purchaser, refused to take the purchase, subject to these incumbrances, but was willing to take it, if they were redeemed; and that the purchase, by *Richardson*, was redeemable, by paying the 300 dollars and 31 cents, with interest, at the rate of 20 per cent. from the time of his purchase. That the plaintiff was entirely ignorant of these incumbrances, at the time of the sale; and he prayed that the master be directed to extinguish the incumbrances out of the purchase money.

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This petition was accompanied with an affidavit of the truth of the facts stated, and was duly served on the solicitor for the defendant, *Rogers*, who held the junior mortgage; and it was accompanied with the Master's report, stating the sale, and the terms of it. The report was silent as to any assurance of title, but the Master annexed to his report, the certificates of the street commissioner for the city of *New-York*, dated since the sale, and also the certificate of the collector of taxes, stating the sale to *Richardson*, as mentioned in the petition, for the purpose stated, and, also, the other tax chargeable thereon.

J. Smith, for the plaintiff, moved for an order pursuant to the prayer of the petition, and cited *Sugden's Law of Vendors*, p. 41. and 1 *Vesey, jun.* 266.

M'Kown, contra, on behalf of the defendant, *Rogers*, who held the junior mortgage.

THE CHANCELLOR. The facts stated in the petition and report, remain uncontradicted. The premises, at the time of the sale, were represented "to be free and clear from all incumbrances;" and the Master's report contains no allega-

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tion to the contrary. It, likewise, contains the evidence of the fact of such incumbrances; and the certificates show that the evidence of them came to the Master's knowledge since the sale. The purchaser ought not to be held to his purchase, under these circumstances; and we must intend that the lot was sold, and was purchased with the understanding, that the title was clear, and the price bid is to be taken as a fair and adequate consideration for the premises, free from incumbrances. It is, therefore, just, and for the interest of all parties, that the purchaser, or the Master for him, should be at liberty to apply part of the purchase money in discharge of the incumbrances. *Stretton's case*, (1 Vesey, jun. 266.) though rather an imperfect and unsatisfactory note, contains authority for this direction, as we have here, what was wanted in that case, the Master's report of the incumbrances.

I shall, accordingly, direct, that the Master, out of the proceeds of the sale, redeem the mortgaged premises from *Richardson*, and, also, discharge the lien of the other tax, upon the terms by which they are, by law, redeemable, and that he bring the residue of the purchase money into Court, to abide its order.

Order accordingly.

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LAWRENCE *against* CORNELL and others.

A decree, after it has been entered, but before it is enrolled, may be corrected, where the omission or mistake was inadvertent, and is clearly ascertained.

A defendant who has made payments for his co-defendant, towards satisfying a prior mortgage, and beyond his proportion of the burden, is to be deemed substituted for the plaintiff, on a sale of the premises, to that extent, and as far as the fact appears from the proceedings in the cause.

PETITION of the defendant *Cornell*, stating, that through inadvertence, and unintentionally, his right and interest, stated in his answer, to a portion of the surplus of the proceeds of the mortgaged premises, after satisfying the plaintiff, were omitted to be provided for by the decree, which was prepared by the plaintiff's counsel, and entered by consent of the solicitors of all the parties. The fact was verified by the accompanying affidavit of the plaintiff, and nothing appeared to gainsay it. *August 8th.*

The petition, accordingly, prayed that the decree might be amended in that respect.

J. Smith, for the motion.

M'Kown, *contra*, and for the defendant *Rogers*, who held the junior mortgage, and claimed the surplus.

THE CHANCELLOR. The mistake is manifest; and if it had been suggested at the time, there would undoubtedly have been a provision inserted in the decree, that the petitioner should be deemed substituted for the plaintiff, so far as he had made any payments, on the elder mortgage, for the proper debt of the defendant, *Matthews*, or beyond his pro-

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portion of the burden. This appears to have been the case as to a moiety of the sums of 70 dollars and 200 dollars, paid by him in 1817. The defendant, C., claims the benefit of substitution for the other moiety of those sums, on the ground of some alleged agreement with the plaintiff, at the time of the payment, and on the further ground, that the defendant M. ought to have no benefit from the payment. But the burden was equally chargeable upon the defendants, C. and M., and whatever rights he may have upon any agreement, (which this order will not prejudice) the benefit of substitution is only to be applied in a clear case, appearing from the proceedings in the cause.

The next question is, whether the decree can be rectified as to this omission, (appearing to have been unintentional and inadvertent) upon motion, without putting the party to the expense of a rehearing, which would consume a great part of the sum to be secured. The decree is not yet enrolled and signed, and I am inclined to think that, according to the *English* practice, the decree, though passed and entered, may be corrected before enrolment, on motion, in a clear case, and where the insertion would have been of course; but there must be a separate, supplemental order, for the purpose. (*Wyatt's P. R.* 155. *Newland's Pr.* 185, 186. 7 *Vesey*, 293. *Lane v. Hobbs*, 12 *Vesey*, 458.)

Order accordingly.

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ROSE against WOODRUFF.

- A decree in a cause is never pronounced, unless the cause is regularly set down for hearing in term, except when it is submitted out of term, by consent of all parties; but the decree may be afterwards entered in term time, or in vacation, at the Chancellor's discretion. And where a bill is taken *pro confesso*, the plaintiff cannot, therefore, take a decree; but must set down the cause for hearing in term, ~~and the Clerk must attend with the record of the bill, to be read at the hearing;~~ but no notice of the hearing need be given to the defendant, or affixed up in either of the public offices.

THE BILL, in this cause, was taken *pro confesso*, and *August 12th.* an order for that purpose was obtained and entered on the 17th of July last.

N. W. Howell, for the plaintiff, now moved for a decree, such as the bill entitled him to, without waiting to set down the cause for hearing at the next term.

THE CHANCELLOR. The course and practice of the Court is not to pronounce a decree in any case, (except where a cause had been submitted to the Court, out of term, by consent of parties,) unless the cause had been regularly set down for hearing in term. The rule is the same, whether the decree is to be pronounced upon the bill only, or upon the bill and answer, or upon the pleadings and proofs. When the cause has been regularly brought to a hearing, and time taken to consider, the decree may be entered at any time thereafter, in term time, or in vacation, in the Chancellor's discretion, whenever he is ready to pronounce it.

In *Johnson v. Desmoneere*, (1 Vern. 223.) it was said, that the practice, before that time, (1683) was, not to take a

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bill *pro confesso*, (though the defendant had appeared, and stood in contempt, and compelled the plaintiff "to go to the end of the line, and run through all the process of the Court against him,") without putting the plaintiff to prove the material allegations in the bill. But, in that case, it was admitted, that the bill might be taken *pro confesso*, without such proof. By the rules of this Court, we allow bills to be taken *pro confesso*, without obliging the plaintiff to pursue the defendant on to process of sequestration. In *Hawkins v. Crook*, (2 P. Wms. 556.) it is stated, that though the bill need not be proved after the defendant has appeared and stood out, in contempt, to a sequestration; yet that the cause was to be *set down to be heard*, and the record of the bill produced, to the end that the bill might be taken *pro confesso*. The *English* practice now is, to *set down the cause for hearing*, upon a previous order that the bill be taken *pro confesso*, and that the Clerk in Court attend with the record of the bill at the hearing. (*Newland's Pr.* p. 29.) Where the bill is thus taken *pro confesso*, and the cause thereupon set down for hearing, the course, says Lord *Eldon*, in *Geary v. Sheridan*, (8 Vesey, 192.) is for the Court to hear the pleadings, and itself to pronounce the decree, and not to permit the plaintiff to take, at his own discretion, such a decree as he could abide by, as in the case of default by the defendant at the hearing. Even with respect to the case of a default at the hearing, I observe, that by Lord *Clarendon's* rules, (*Beames' Orders*, p. 197.) if the defendant, or his counsel, did not appear at the hearing, yet the answer was to be read, and the Court was then to determine, upon such hearing, if there was cause to decree for the plaintiffs.

The 91st rule of this Court shows, that where a bill of foreclosure of a mortgage is taken *pro confesso*, the cause must, thereafter, be regularly set down for hearing, at term; and that *part of the rule* was not introductory of any new provision peculiar to the case of bills to foreclose. The

rule, in that respect, was only *declaratory of the general practice*.

As setting down the cause for hearing in such cases is for the sake of the Court, and to preserve order, and to prevent surprise, it is not necessary to give notice to the defendant of the hearing, or to affix notice in either of the public offices. The defendant who suffers the bill to be taken *pro confesso*, has nothing to say, and requires no such notice.

Motion denied.

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GOODRICH, Administrator, with the will annexed, of P.
MILLER, against PENDLETON.

The Surrogate of the City and County of New-York, has no authority to grant letters of administration with the will annexed, of a person ~~residing out~~ of the state.

By the acts, (1 N. R. L. 449. Sess. 36. ch. 79. sec. 17. Sess. 38. ch. 157.) the Surrogate's powers, in this respect, are limited to the case of a non-resident of the state dying *intestate, and leaving goods and chattels in the City of New-York*.

That the plaintiff who sues as administrator, has not actually taken out letters of administration, or that the letters of administration were not granted by an officer having competent authority to grant them, in the particular case, may be objected to by plea, or in the answer, or by demurrer; and if insisted on at the hearing, the bill will be dismissed. But if letters of administration are duly taken out any time before the hearing, it will be sufficient, and may be charged by way of supplement, or amendment.

BILL for an account and payment of moneys received *August 1841* by the defendant for and on behalf of the testator.

It appeared, by the bill, that *Ph. Miller*, the testator, was an inhabitant of the state of *Georgia*, and died there, and

dying

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that his widow, *Catharine Miller*, was one of the executors of his will, and took upon herself, exclusively, the trust, and acted as an executrix; and the claim in the bill was founded upon dealings by the defendant with her in that character. She was an inhabitant of *Georgia*, and died there, and the defendant was an inhabitant of *Dutchess* county, in this state. Letters of administration, with the will annexed, were granted to the plaintiff by the Surrogate of the City of *New-York*. It did not appear either in the pleadings or proofs, what right or title the plaintiff had to take out letters of administration, or that the testator left any goods or chattels in the City of *New-York*.

The defendant, in his answer, and also at the hearing, insisted, that the plaintiff was not the lawful representative of *Ph. Miller*, and had no right or title to sue in that character, inasmuch as he showed no authority as administrator from the Court of Probates of this state.

The cause was argued at the last term, briefly upon this point, and at large upon the merits.

Boyd and Riggs, for the plaintiff.

The defendant, in proper person, and *Hoffman*, contra.

As to the above point, was cited the *Statute*, 1 *N. R. L.* 444. sect. 3. 15. 17. and *Weston v. Weston*, 14 *Johns. Rep.* 428.

THE CHANCELLOR. The point that meets us at the very threshold of this case, and which seemed to be very lightly touched at the hearing, has appeared to me, upon examination, to be insurmountable. I cannot discover that the Surrogate of *New-York* had authority to grant letters of administration in this case, and the plaintiff, therefore, shows no title to appear in the character he has assumed.

It is not without regret that I have arrived at this conclusion, considering that this cause has been brought to a hearing, at great expense, and discussed fully upon its merits. But though the objection may appear to be quite formal and technical, the defendant has certainly a right to insist that the person who undertakes to call him to an account, should have competent authority to do so, and he is entitled to question the validity of the plaintiff's commission. Such an objection was allowed in the case of *Winn v. Fletcher*, (1 *Vern.* 473.) to be good, by way of plea; and there the defendant pleaded that the plaintiff was not an administrator, as he averred himself to be. In *Fell v. Lutwidge*, (2 *Atk.* 120. *Barnard Ch. Rep.* 319.) the exception was taken, for the first time, at the hearing, that the plaintiff had not taken out letters of administration until long after the bill was filed; and though Lord *Hardwicke* overruled the exception, it was not because it was too late, but on the ground that procuring letters of administration before the cause was brought to a hearing, was sufficient. Here the objection was put forward distinctly in the answer; and it may as well be made in the answer as by plea. The general rule is, that after a plea has been overruled, the same defence may be insisted on by way of answer. (2 *Vesey*, 491. 3 *P. Wms.* 95. *Redesdale's Tr.* 244.) And as the objection was taken from the answer, and made a point at the hearing, the counsel for the plaintiff did not attempt to resist it on that ground. They met the objection on its merits, by insisting that the Surrogate of *New-York* had competent power to grant letters of administration, in the given case.

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After a plea is overruled, the same defence may be insisted on by way of answer.

In the note to the case of *Cleland v. Cleland*, (*Prec. in Ch.* 63.) it is stated, that the objection that the administrator was not made a party defendant to a suit, was overruled, because the wife was charged as administratrix, and confessed in her answer, that she had possessed and administered the personal estate of her deceased husband, though

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Though a person is legally entitled to administration, he cannot sue, without taking regular letters of administration.

she denied, by answer, that she had taken out letters of administration. The objection was, probably, raised by her at the hearing, and, perhaps, she was thought to be concluded by her acts; and the note adds, also, that she was *the person by law entitled to administration*. That last circumstance clearly was not sufficient to dispense with the letters of administration from the proper source. In *Humphreys v. Humphreys*, (3 P. Wms. 348.) the next of kin entitled to administer, sued, without letters of administration, and a demurrer to the bill for that cause, was allowed. But that case, like the one of *Fell v. Lutwidge*, might have taught the plaintiff, after the admonition given in the answer, how easily the defect was to be cured. Letters of administration were taken out, in that case, and charged by way of amendment to the bill; and the Lord Chancellor held, that the fact might be charged, either by way of supplement or amendment.

The plaintiff does not appear to have had any particular right or claim to sue out letters of administration on the estate of the testator; and his title to sue is destitute of every adventitious aid and presumption. We are driven, therefore, to discuss the strict point of law, whether the *surrogate* had jurisdiction in the case.

Jurisdiction
of the Court of
Probates.

The Court of Probates, consisting of a single Judge, was recognized in the 27th article of the Constitution; and by the act of the 16th of *March*, 1778, *organizing the government*, the Judge of that Court was declared to be vested with all and singular the powers and authorities, and to have the like jurisdiction, in testamentary matters, which the governor of the colony of *New-York* had exercised, as Judge of the Prerogative Court, or Court of Probates of the colony. Under this authority, the Court of Probates issued, exclusively, letters testamentary, and letters of administration, upon proof taken, as well by the *surrogates*, as in that Court; and this practice was continued until the

power of the Surrogates was enlarged by the act of the 20th of *February*, 1787. (Sess. 10. ch. 38.)

Under the last act, *Surrogates* in each county were authorized to grant letters testamentary, and letters of administration with the will annexed, and letters of administration of persons dying intestate "within their respective counties;" and the same were declared to be as valid as if issued by the Court of Probates. But in all cases of persons dying "out of this state," or within this state, "not inhabitants thereof," their wills were to be proved, and administration of their personal estates granted by the Judge of Probates, "in the manner heretofore used, and before, or by no other person."

The revised act of the 27th of *March*, 1801, declared, also, that the Judge of the Court of Probates, was vested with all the powers and authorities of the Court of Probates of the colony of *New-York*, "except as was therein otherwise provided;" and in that act, the powers of the Surrogates were continued, with some little alteration in the phraseology of the provisions. The Surrogates were declared, by the third section of the act, to have, "except as to persons who may not, at the time of their decease, be inhabitants of this state," the sole and exclusive power to grant letters testamentary, and letters of administration of the goods of persons dying intestate, or with the will annexed, of all deceased persons who, "at, or immediately previous to their death, shall have been inhabitants of the respective counties of such Surrogates, in whatever place the death of such persons may have happened." And in the 12th section of the act, it was declared, that in all cases of persons dying "out of this state," or of persons dying within this state, "not inhabitants of this state," their wills may be proved before, and administrations of their personal estates granted by, the Judge of Probates, "in the manner heretofore used, as well as by any of the said Surrogates."

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These words, *as well as by any of the said Surrogates*, are a substitute for the words, *and before or by no other person*, in a similar section in the act of 1787; and, upon the first impression, it would seem to have been intended to give the Surrogates *concurrent* jurisdiction with the Judge of Probates, in the case of persons not inhabitants of this state, as the former section had already given them *exclusive* jurisdiction, where the persons dying were inhabitants. But these provisions in the act of 1801, having been literally transcribed into the new revised act of 1813, (1 N. R. L. p. 444.) received a judicial exposition in the Supreme Court in *Weston v. Weston*. (14 Johns. Rep. 428.) It was there solemnly adjudged, that the Surrogate of the county of *Onondaga*, had no authority to grant letters of administration upon the estate of a person dying out of the state, and not being an inhabitant of it. The words, "as well as by any of the Surrogates," were taken distributively, and applied *only* to that part of the section which was supposed to give to the Judge of Probates, power as to persons dying out of this state, who were at, or immediately previous to their death, inhabitants of the state. The 3d section of the act had already given the Surrogates *exclusive* power in the case of inhabitants of this state, "in whatever place the death of such persons may have happened." There is still a difficulty in supposing, as the case of *Weston v. Weston* seems to suppose, that the other section (being the 15th of the act of 1813) intended to give any *concurrent* power to the Judge of Probates, in the case of persons dying out of this state, who were inhabitants of it, and absent *animo revertendi*, or, in the words of the act of 1787, who died "while absent from home, upon a journey on business." The 3d section of the act of 1813, gave "sole and exclusive power," in such case, to the Surrogates; and could the 15th section have meant any thing so repugnant to that 3d section, as to give the Court of Probates "concurrent" power in that case? If, in order to reconcile both parts of

the act on this point, we construe the 15th section as meaning to give to the Court of Probates, jurisdiction in the case only of persons dying without, or dying within the state, *not being inhabitants of it*, then the words *as well as by any of the said Surrogates*, become senseless, unless they are to be construed as giving a concurrent jurisdiction to the Surrogate, and the Judge of Probates, in the case of persons not inhabitants of this state. There is no absolute and irreconcilable inconsistency between the 3d and 12th sections of the act of 1801, or the 3d and 15th sections of the act of 1813, on this construction, giving to the Surrogates exclusive jurisdiction in the case of inhabitants of this state, and concurrent jurisdiction in the case of persons not inhabitants of this state. The exception in the third section, applies to their *exclusive* jurisdiction, for it is declared, that *except as to persons not inhabitants*, they shall have *full and exclusive* jurisdiction; and the statute may, afterwards, have given to them *concurrent* power as to persons not inhabitants, without overthrowing the exception.

I should, therefore, have had doubts upon the construction given to the Surrogate's powers by the decision in *Weston v. Weston*, if the question had arisen, *de novo*, before me; but I do not feel myself at liberty to seek after another construction, in opposition to such high authority; and especially in a case where the point came properly and directly before the Supreme Court. It would be a great public inconvenience, and tend to render the law vague and uncertain, to introduce conflicting decisions upon the construction of the powers of public officers, when those powers are in constant activity.

Assuming, then, (as I think I am bound to do, under a proper sense of respect and comity) the authority and validity of the construction given to the Surrogate's powers, by the case of *Weston v. Weston*, we are next to inquire, whether the Surrogate of the city of *New-York* has other and greater powers, in the given case.

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The act of 1801, directed administration to be granted, without sureties, to the *Chamberlain* of the city of *New-York*, in the case of "any person dying intestate within the city and county of *New-York*," and in case the widow, or next of kin, should not apply within one week. But the administration was to be granted by the Surrogate, or the Judge of the Court of Probates, "*as the case might be*;" and it, accordingly, left the powers distributed between the Surrogate and the Judge of Probates, as it found them. The act of 31st March, 1802, (Sess. 25. ch. 83.) extended the above provision to "all cases of persons not resident within this State, who may die intestate, leaving goods and chattels within the city and county of *New-York*, whether such intestate shall die within this state or not." These two provisions were consolidated and transcribed into the revised act of 1813; (1 *N. R. L.* 449. s. 17.) but the question of jurisdiction between the Judge of Probates and the Surrogates, was not touched, altered, or affected, by any new or different provision. The power was still to be exercised by the Surrogate or Judge of the Court of Probates, "*as the case might be*." Each officer was left to move in the particular sphere in which the law had previously placed him.

The act of the 11th of April, 1815, (Sess. 38. ch. 157.) substituted a *public administrator* for the city of *New-York*, in lieu of the *Chamberlain*, in the above case; and the consolidated provision in the act of 1802, was re-enacted in the same words, but with additional provisions, which would seem, *by implication*, to have given jurisdiction to the Surrogate, even to the extent of the whole case, as stated in the act of 1802. It declares, that if the widow, or next of kin, shall not apply within thirty days after such citation, *as is therein after directed*, to the Surrogate or Judge of the Court of Probates, "*as the case may be*," for administration, that then administration was to be granted to the public administrator. The citation, therein directed, is to be issued, not

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by the Judge of Probates, but by *the Surrogate*, to the widow and next of kin, "to appear and show cause, why such administration should not be granted;" and before whom are they to appear and show cause? If before the Surrogate, as the provision would seem necessarily to imply, it then equally implies that the Surrogate may grant letters of administration in the case, which is, *if any person, not resident within this State, dying intestate, leaving goods and chattels within the city and county of New-York, whether such intestate shall die within this state or not.*

But, if it be admitted, that the Surrogate of *New-York* has greater powers than the Surrogate of *Onondaga* county, it is only in the case of persons dying *intestate*, and leaving goods and chattels within the city and county of *New-York*. All the special powers (if any there be) granted to the Surrogate of *New-York*, in extension of the ordinary jurisdiction of the Surrogate, are confined to the case of persons resident abroad, dying *intestate*, and leaving goods and chattels in *New-York*. The revised act of 1813, in the 3d, and again in the 10th section, has clearly noticed, and marked the distinction between an administration upon the estate of a person dying *intestate*, and an administration with the will annexed; yet, in the 17th section of this act, and in the subsequent acts on that subject, the distinction so material in itself, so well known in law, and so familiar in the language of the Legislature, is omitted, and the new and special provisions for the city of *New-York*, are confined to the case of persons dying *intestate*.

In the case before me, *Phineas Miller* did not die *intestate*. He made a will, appointed executors, and one of them administered, and her powers and acts are recognized in the plaintiff's case: nor does it appear that *Ph. Miller*, the testator, left any goods and chattels in the city of *New-York*. If the claim upon the defendant be goods and chattels, yet the bill admits that the defendant resided in *Dutchess* county. Debts due by specialty are said to be *bona notabilia*, in the

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place where they are, that is, where the creditor resided and died, and not where the debtor inhabits ; but debts due by simple contract are *bona notabilia* where the debtor resides. (*Godol. Orp. Leg.* 70.) There is nothing in this case, therefore, that can help the plaintiff. To give to the Surrogate of *New-York*, a broader jurisdiction than the country Surrogates possess, it ought to have been distinctly shown, or made to appear, that *Ph. Miller* died intestate, and left goods and chattels in the city of *New-York*.

There may be no good reason why the Surrogate of *New-York* should not have power to grant letters testamentary upon testators' wills, as well as letters of administration upon intestates' estates ; and it might be very convenient that he should have the power ; but if it is not contained in the statute, it certainly cannot be assumed. The *argumentum ab inconvenienti* cannot be applied to extend the limits of power, when the language of the statute, defining the limit, is explicit, and its meaning clear, without any visible mixture of injustice or absurdity.

The power of proving wills, and granting administration, was originally vested in the Court of Probates ; and though most of its jurisdiction is now transferred to the Surrogates, that is still the Court of Appeals from the acts of the Surrogates, and it is the Court of general jurisdiction over the subject matter. There is some analogy, therefore, between the powers of the Surrogate and of the *Ordinary*, in *England*, and between the Judge of Probates and the *Metropolitan* of the province ; and the rule may be applied to the Surrogate, which is applied to the *Ordinary*, that if he grants administration in a case not within his authority, but in one that belongs to the *Metropolitan*, the same is absolutely void. (*Allison v. Dickenson*, *Hardres*, 216. *Holt, Ch. J. in Blackborough v. Davis*, 1 *P. Wms.* 41. *Hilliard v. Cox*, 1 *Salk.* 37. *Godol.* 70.) It is, also, a general principle, applicable to all Courts of limited jurisdiction, that they must act within the limits of their authority ; and it must appear upon the

face of their proceedings, that they did so, or their acts will be deemed *coram non judice*, and void.

I feel, therefore, constrained (however reluctantly) to declare, that the plaintiff has not shown a title to sue here, as the representative of *Phineas Miller*, deceased, and that the bill must be dismissed ; and I shall do it without costs, and without prejudice.

Decree accordingly.

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HATCH *against* COBB.

On a contract, between the plaintiff and defendant, for the sale of land, the payment of the purchase money, by the plaintiff, was made a condition precedent to the conveyance ; and after a default, the defendant accepted part of the purchase money, but the plaintiff, though repeatedly called on, refused to complete the payment. The defendant, after giving notice of his intention to do so, sold, and conveyed the land to another : and the plaintiff, afterwards, tendered the money due on the contract, and filed a bill for its specific performance : *held*, that a specific performance could not be decreed ; nor could the bill be sustained for a compensation in damages.

This Court does not, unless in some very special case, sustain a bill for damages on a breach of contract.

It seems, that even if the defendant had not sold the land to another, before the plaintiff filed his bill, he would not, after such default and delay, on his part, have been entitled to a specific performance, as no accident, mistake, or fraud, had intervened to prevent the performance on his part.

BILL for a specific performance of a contract, on the part of the defendant, to sell land to the plaintiff. August 19th.

It appeared, from the pleadings and proofs, that the plaintiff had made default in the payments which, by the contract, were made a condition precedent to the conveyance. That

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the defendant had accepted one small payment, subsequent to such default, but, that about six months thereafter, the defendant repeatedly called for payment, and gave notice, that if the plaintiff did not pay him, he should be obliged to part with his interest in the land agreed to be conveyed. No payment being made, he assigned over his right to a third person; and the plaintiff, with the knowledge of that fact, made a tender of the balance due on the contract, and filed his bill for a specific performance of the contract, or for a compensation, in damages, for the payments he had already made, and the improvements he had made upon the land. The plaintiff, subsequent to his default in payment, had confessed a judgment to a third person, for 1,000 dollars, to cover his property.

Howell, for the plaintiff.

J. C. Spencer, contra.

THE CHANCELLOR. A specific performance cannot be decreed. The defendant had fairly disabled himself before the suit was brought, and this was known to the plaintiff. He was not bound to wait any longer upon the plaintiff, but had a clear right to exact immediate payment, or else to part with his interest in the land to another, in order to meet his own convenience or necessities. It is doubtful how far the Court has jurisdiction to assess damages, merely in such a case, in which the plaintiff was aware, when he filed his bill, that the contract could not be specifically performed or decreed. It is properly a matter of legal cognizance. The case of *Denton v. Stewart*, (1 Cox, 258.) was hesitatingly followed by Sir Wm. Grant, in *Grenaway v. Adams*, (12 Vesey, 395.) but it has been much questioned by Lord Eldon, in *Todd v. Gee*; (17 Vesey, 273.) and though equity, in very special cases, may possibly sustain a bill for damages, on a breach of contract, it is clearly not the ordinary

jurisdiction of the Court. In *Phillips v. Thompson*, (1 *Johns. Ch. Rep.* 131.) the bill was retained in order to afford a compensation, in damages, under a feigned issue, but that case was under peculiar circumstances. The bill was filed for discovery and for specific performance, and the plaintiff made out a case of very clear equity to relief, and the remedy was precarious at law.

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If the defendant had not parted with his interest before the filing of the bill, it might, even then, have been a point deserving of consideration, whether the plaintiff was entitled to assistance, when no accident, mistake, or fraud, had intervened, to prevent the performance of the contract, on his part, and when after indulgence, and after considerable subsequent delay, he had twice been required to make payment, and had omitted to do it. The acquiescence in his default, or the waiver of it, by the defendant, had terminated before the assignment, by these calls for payment, and the doctrine in *Benedict v. Lynch*, (1 *Johns. Ch. Rep.* 370.) would seem to apply.

But it is not intended to prejudice any claim the plaintiff may have under his contract, at law, for damages. (a)

Bill dismissed without costs.

(a) *Vide Ballard v. Walker*, (3 *Johns. Cas.* 60.) where the vendee suffered four years to elapse, before he offered to fulfil the agreement, on his part, and in the meantime, the vendor had sold the land to another; the Supreme Court considered the contract of sale as rescinded or abandoned; and in an action brought by the vendee, to recover damages for the non-performance, gave judgment for the defendant. *Orby v. Trigg*, 9 *Mod.* 2.

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ELMENDORF and BERKMAN against G. LANSING, Jun. and others.

Where an executor, or other trustee, mismanages the estate confided to his care, or puts the assets in jeopardy, by his actual or impending insolvency, this Court will restrain him from all further intermeddling with the estate, and compel him to restore the funds in his hands.

An executor, on a bill filed against him by his co-executors, was restrained from all further interference in the management of the estate, and decreed to restore to the plaintiffs a bond and note of the estate, in his possession, but not to account for money he had received on the bond, or to pay the costs of the suit.

August 22d.

THE bill stated, that *Jeremiah Lansing*, of *Albany*, who died in *February*, 1810, by his last will, appointed the plaintiffs, and the defendant, *G. Lansing, jun.* his executors. *G. L.*, who had united with the plaintiffs in the execution of the will, removed to *Herkimer* in 1811, and the whole care of the estate, from that time, devolved on the plaintiffs. In *September*, 1817, *G. L.* returned to *Albany*, and demanded of *B.*, one of the plaintiffs, access to the papers of the testator. which was, at first, refused. but afterwards granted; and without the knowledge or consent of the plaintiffs, *G. L.*, took from the assets of the testator, a bond of *J. T.*, for 1,215 dollars, and a note of *G. P.*, for 2,218 dollars and 47 cents; and assigned them to *J. V. N. Yates*. from whom he received a bond and mortgage in his own name. On representation, and at the instance of the plaintiffs. this assignment, and the securities, were cancelled, and the bond and note returned to *G. L.* who had demanded. and received of the obligor 200 dollars, and refused to return to the plaintiffs the bond and note, or deposit them with the papers of the testator, or account for the mo-


ney so received by him. That in *November, 1818*, *G. L.* again sold the note to one *S.*, and received a greater part of the amount to his own use; and had put the bond in the hands of an attorney, with directions to collect it for him. That *G. L.* had drawn a check on the *Bank of Albany*, for 450 dollars, as one of the executors, in favour of one *W. G.*, which had been refused payment, and *W. G.* had brought an action thereon against the bank. The bill charged that *G.* was utterly insolvent, and was indebted to the estate of the testator. That the interest of the estate did not require that the bond and note should be collected. The bill *prayed*, that the defendants *G. L.* and *S.*, may be decreed to deliver the bond and note to the plaintiffs, or bring them into Court, and for an injunction, and for general relief.

The *answer of G. L.*, charged the plaintiffs with remissness in settling the estate, and as disposed to exclude him from an active participation in the management of it. He admitted, that he took the bond and note belonging to the testator's estate, and insisted that he had a right to do so; that his object was to guard the interest of the estate, and not fraudulent, or with a view to appropriate the money to his own use. He admitted the assignment to *Yates*, which was afterwards cancelled; that he, afterwards, sold the note to *S.*, but that the sale had since been revoked, and the note returned. That he drew the check on the bank, which had been refused payment, because not signed by a majority of the executors, and a suit brought in the name of *D.*, who was his agent. He denied the charge of insolvency. He admitted, that he received the 200 dollars on the bond, but without intending to apply it to his own use; that he was indebted to the estate for money received as executor, of which he had already rendered an account, except for the 200 dollars; but that, on a settlement of all just claims between him and the estate, there would be a balance in his

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favour. That he is a legatee, and entitled to a just allowance, as an executor, &c.

The other defendants put in their answers; and proof was taken as to the insolvency of *G. L.*, and it appeared, that he had little or no property.

Van Buren and *Butler*, for the plaintiffs. They cited 2 *Cases in Ch.* 130. *Ambler*, 309. 2 *Vesey*, jun. 94. 4 *Vesey*, 592. 5 *Vesey*, 722. 2 *Atk.* 213. 2 *Sch. & Lef.* 26. 1 *Bro.* 105. 279. 13 *Vesey*, 266. 4 *Bro.* 277. 2 *Vesey*, 95. *Rep. in Ch.* 110. *Carth.* 457. *Cases in Ch.* 75. 2 *Vern.* 249.

J. V. N. Yates, contra.

THE CHANCELLOR. The defendant *Lansing's* answer, is a sufficient admission of abuse of trust. After residing several years out of the city and county of *Albany*, he returned there in 1817, and took from the custody of the plaintiffs, without their knowledge or consent, a bond and note, being part of the testator's assets, and which amounted, on the face of them, to 3,400 dollars, and upwards. He applied to the obligor of the bond, and received 200 dollars, in part payment of it, and then sold the bond and note to a third person, and took a bond and mortgage for the amount to himself. The bond was then put in suit by the purchaser; but, upon the remonstrance of the plaintiffs, the sale was rescinded, and the bond and note restored to the defendant. He then sold the note to another person, and that sale was afterward rescinded. The bond was then ordered to be put in suit, and he drew a check on the *Bank of Albany*, where the executors had made deposits of the trust moneys, for 450 dollars; and the check was delivered to the other defendant, who resided in his family, and is charged to be insolvent.

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These acts show an unequivocal disposition to convert the assets of the testator to his own use, and the proof is full and satisfactory to the point, that this defendant is worth little or no property. It becomes, therefore, just and necessary, that the defendant *L.*, should be restrained from further intermeddling with the estate, as a co-executor; and that he should restore the bond and note which he so improperly took, and has so injuriously converted; and that the suit against the bank, upon the check, should be perpetually enjoined, and the check cancelled.

It is a settled principle of this Court, that an executor, or other trustee, who mismanages, or puts the assets in jeopardy, by his insolvency, either existing or impending, should be prevented from further interfering with the estate, and that the funds should be withdrawn from his hands. The authorities to this point are sufficiently numerous. (*Rous v. Noble*, 2 *Vern.* 249. *Batten v. Earnley*, 2 *P. Wms.* 163. and *vide* 3 *P. Wms.* 334. *S. P. Carth.* 458. *Taylor v. Allen*, 2 *Atk.* 213. *Utterson v. Mair*, 4 *Bro.* 277. 2 *Ves. jun.* 95. *Lake v. De Lambert*, 4 *Vesey*, 592. *Middleton v. Dodswell*, 13 *Vesey*, 266.) I shall, accordingly, restrain the defendant *L.* from acting, or intermeddling any further with the assets, or in the administration thereof, as a co-executor; and shall direct him to restore the bond and note to the plaintiffs, and cause the check on the bank to be cancelled; and that the suit thereon be perpetually enjoined.

As to the 200 dollars, which *L.* has collected, that may be left to be accounted for when he is called to an account, at the instance of creditors or legatees, for his previous share of the administration of the estate, in which, perhaps, he may have a claim for just allowances. This suit is founded on principles of preventive policy, and to stay future waste and conversion of the assets. I am not disposed to go further upon this present application by the co-executors. I shall not charge the defendants with the plaintiffs' costs of

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this suit, but I shall allow the plaintiffs to charge their reasonable costs and charges of this suit, upon the assets in their hands.

Decree accordingly.

S. & P. PENNY against MARTIN and others.

Where there is neither accident nor mistake, misrepresentation nor fraud, this Court has no jurisdiction to afford relief to a party, on the ground that he has lost his remedy at law, through mere ignorance of a fact, the knowledge of which might have been obtained by due diligence and inquiry, or by a bill of discovery.

As where the plaintiffs brought a suit at law against two persons, as partners in trade, under the firm of *R. & M.* and recovered a judgment, but for which they were unable to obtain satisfaction out of their joint property, or the separate property of *M.*, who was insolvent, the other partner not having been brought into Court, on the meane process: and the plaintiffs, afterwards, discovered, for the first time, that *N., L. and P.* three other persons, were dormant partners with *R. & M.*, and jointly interested together in the transaction, out of which the plaintiffs' right of action arose: Held, that this Court had no jurisdiction to afford relief against the dormant partners.

THE plaintiffs brought an action of *assumpsit* in the Supreme Court, against the defendants, *Reorback and Mitchell*, for meal and corn sold to them, as partners. The *capias* was returned taken as to *Mitchell*, and not found as to *Reorback*. A second *capias* was issued against *R.* to answer *simul cum M.* which was returned not found. The plaintiffs then proceeded against *M.*, under the act, (1 *N. R. L.* 515. sess. 38. ch. 56. sec. 13.) which declares, that when in a suit against joint debtors, all are not taken and brought into Court, the plaintiff shall have judgment and execution;

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is the same whether as if all the defendants had been brought into Court; but that no execution shall be executed against the person, or the sole property of any one not brought into Court, and recovered a judgment for 563 dollars and 14 cents damages, and 47 dollars and 80 cents costs, which was docketed Nov. 1, 1810; and a *fi. fa.* issued thereon, to be levied of the joint property of *R. & M.*, and on the separate property of *M.* The execution was returned unsatisfied. The bill charged that *Mitchell* was insolvent, and that the plaintiffs could not proceed at law against the separate property of *R.* That on the 15th of January last, the plaintiffs first discovered that the defendants, *Norris L. Martin*, and *Samuel Lamb*, and *John Lamb*, were, at the time of the sale and delivery of the meal and corn to *R.* and *M.*, for the price of which the action of assumpsit was brought, partners of *R.* and *M.* in the trade and business, though the same was carried on in the names of *R.* and *M.*, and that the meal and corn were so purchased of the plaintiffs, for the joint account and benefit of all the defendants. That the said *N. M.*, *S. L.* and *J. L.* refused to pay, &c. and the plaintiffs prayed relief, &c.

The defendants put in a *general demurrer* to the bill.

Wells and *G. W. Strong*, in support of the demurrer.

Ely & M^cConn, contra.

THE CHANCELLOR. The facts in this case are few and simple. The plaintiffs sued the defendants, *R.* and *M.*, as partners in *assumpsit*, at law, and *M.* only was taken. The suit was carried on, under the provision in the statute, against *M.*, who was taken, and judgment rendered against both *R.* and *M.*; and the remedy under it is limited by the statute to an execution against the joint property of both the defendants, and the separate property and person of the one taken. On issuing execution, it was found that there

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was no joint property, and that *M.*, the defendant taken, was insolvent. Since that time, the plaintiffs have discovered that the other three defendants in this suit were partners with *R.* and *M.* in the contract sued at law; and the question is, whether, upon these facts, the plaintiffs are entitled to the aid of this Court, to recover by its decree, their demand against the dormant partners.

There is no doubt that *R.*, who was not taken in the suit at law, can be sued upon the judgment which was rendered jointly against *M.* and *R.* This was settled by the Supreme Court in the case of *the Bank of Columbia v. Newcomb*, (6 Johns. Rep. 98.) and it was strongly intimated in that case, that the defendant not taken in the original suit, would be entitled to make any defence which he might have made in his distinct individual capacity, had he been arrested in the original suit. This conclusion can work no prejudice to the plaintiffs, and it would seem to follow from the plainest principles of justice. It is equally certain that the present defendants, who now join in the demurrer, might have been sued at law in the original action. The demand is on a contract, to which it is alleged they were parties, as being dormant partners with *R.* and *M.* The omission to make them parties in the action at law, arose, according to the allegation in the bill, from ignorance of the fact that they were such partners. Is that ignorance a sufficient ground for transferring to this Court, jurisdiction of a matter properly, if not exclusively, cognizable at law? The ignorance might have been removed by due vigilance and inquiry, and perhaps by the assistance of a bill of discovery here. The plaintiffs have no particular equity entitling them to relief. Ignorance, as Lord *Loughborough* said, is not mistake. They never inquired whether *R.* and *M.* had secret partners, and they gave the whole credit to them. If they have now got into embarrassment and difficulty, in respect to their legal remedy, by pursuing the ostensible partners at law, without such inquiry, I do

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not know of any principle that will authorize this Court to take jurisdiction of a case where the remedy was, in the first instance, full and adequate at law, because the party may have lost that remedy by ignorance, founded on negligence, not on accident, or mistake, or on any misrepresentation or fraud. Generally speaking, a jurisdiction does not arise here from the mere circumstance that a party has omitted to make a proper case at law. There is no such head of equity jurisdiction. The general rule is, that if the party becomes remediless at law by negligence, he shall not be relieved in equity. He must show that he has been deprived of his legal remedy by accident, casualty, misfortune, &c. (1 *Fonb. Tr. b. 1. ch. 3. sec. 3. §. 3.*)

It is to be observed, that here are no special circumstances disclosed by the bill. We have only the naked fact, that the plaintiffs discovered, since the judgment at law, that the defendants were partners; but whether they were kept in ignorance by undue means, or took any previous steps to remove it, does not appear, and is not, therefore, to be presumed. Whether they have, or have not, lost their remedy at law, (and on which I give no opinion,) the demurrer must be pronounced to be well taken, and the bill dismissed, without costs.

Decree accordingly.

NOTE. After the above opinion was delivered, the Chancellor said, that he had seen the case of *Willings & Francis v. Consequa*, decided in the Circuit Court, for the third circuit of the *United States*, in 1816; (1 *Peter's Rep.* 301.) and that an opinion expressed in the course of the trial in that cause, happened to fall directly on the point decided in this case. That he noticed it the more readily, (though it was not as precise and certain as could have been wished) since he has not met with any other opinion or *dictum* that applied fully to the question. *Kuhn*, a dormant partner of *Willings & Francis*,

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was offered as a witness, and he was objected to as interested, because *W. & F.* had given a note to *Consequa*, on which they were sued, and a verdict rendered, and it was alleged, that if *C.* was not able to obtain satisfaction from them, he might afterwards sue *K.*, as a dormant partner. It was held by *Washington, J.* that a judgment on the note against *W. & F.*, would as completely extinguish the original debt, as if they had given a bond for it, and that if *C.* should bring an action against *K.*, separately, the latter might defeat it by a plea in abatement, and a judgment in favour of *C.*, would be a bar to any suit that he might bring against the three partners *W. F. & K.* The Judge then added, "but it is said, that though *Consequa* might have no remedy at law against *Kuhn*, he might be relieved in equity, by showing his ignorance that *K.* was a dormant partner when he took the note, or instituted the suit. I, by no means, admit that he could be relieved in that Court. It would still depend upon a variety of circumstances not known to this Court, whether *C.* could make out a case fit for equitable interposition. By his own showing, it is certain that he did not give credit to *K.*, and whether he knew that he was jointly concerned in that transaction or not, is unknown to this Court. It was in his power to have dismissed this suit, though, at the time it was brought, he may have been ignorant of the partnership, and have instituted another against all the partners, after he was informed who they were; and his failing to do so, would indispose a Court of equity to open its doors to him, after he had permitted those of a Court of law to be closed against him." (a).

(a) Vide, also, the case of *Robertson v. Smith*, (18 *Johns. Rep.* 459.) decided by the Supreme Court, in *January* term, 1821. in which the question came directly before the Court; and it was held, that the non-joinder of a partner could only be pleaded in abatement; and that where the plaintiff sued *A.* and *B.* as partners, and recovered a judgment against them; but discovering, afterwards, that *C.* and *D.*

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J. R. LIVINGSTON *against* GIBBONS.

Where an injunction has been already granted, a second injunction will not be granted while the first is in force; unless it has been withdrawn by some agreement between the parties, and satisfactory reasons are shown for a renewal of it.

Nor will an injunction be granted to restrain the defendant, who was charged by the plaintiff with navigating the waters of this state with a *steam boat*, in violation of the plaintiff's exclusive right, from removing his boat, pending an action at law brought to recover the boat as forfeited under the act of the 9th of *April*, 1811, unless there is a direct and positive charge of danger that the boat will be eloiigned, pending the suit at law.

BILL charged that the defendant was daily running the *August 20th.* steam boat *Bellona*, between the State of *New-Jersey* and the city of *New-York*. That the plaintiff had commenced a suit at law for the forfeiture of the said boat, and the recovery of damages, &c., and concluded with a prayer for an injunction to restrain the defendant from navigating with any boat propelled by steam, within the waters of this state, and, also, to restrain the defendant from removing his said steam boat *Bellona* out of the jurisdiction of this Court, pending the suit at law mentioned in the bill.

A. Van Vechten, for the plaintiff, moved for an injunction according to the prayer of the bill.

THE CHANCELLOR denied the motion as to the first part

were dormant partners, brought an action on the same contract against all *four*, as partners, the judgment recovered against *A.* and *B.* might be pleaded in bar to the second suit against the *four*, for the same cause of action.

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* *Ante*, p. 48.

or branch of the injunction, because such an injunction had already been granted and issued, at the instance of the plaintiff, against the defendant, on the 3d day of *May*, 1819,* and a repetition of the injunction, while the former was in force, would be idle and useless, and derogatory to the authority of the Court. If that injunction has been violated, the remedy should be by application for an attachment; or if that injunction has been voluntarily withdrawn by the plaintiff, after it was served, by some arrangement between the parties, (but of which nothing is stated in the bill,) the fact and the reason of it, and the new grounds for a renewed application, ought to have been fully stated. The motion was also denied as to the second branch of the case, because it did not come within the meaning or equity of the act of the 9th of *April*, 1811, entitled, "an act for the more effectual enforcement of the provisions contained in an act, entitled, an act for the further encouragement of steam boats on the waters of this state, and for other purposes." The bill charged, that the defendant is *daily* navigating with his boat, the waters of the state of *New-Jersey*, as well as those of this state, and will, unless enjoined, still continue to do so. There is no positive and direct charge of danger, that the boat will be eloiigned, pending the suit at law, or removed out of the jurisdiction of the Court, *without an intention to return*. Nor can such a charge be made, consistently with the other charges in the bill. The case is not brought within the necessity, and, therefore, not within the intention of the special provision of the act against danger of loss by removal. A remedy so unusual, and so severe, ought not to be extended beyond the plain and necessary construction of the statute.

Motion denied.

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E. P. LIVINGSTON *against* D. LYNCH, Jun. and others.

In private associations of individuals, the majority cannot bind the minority, unless by special agreement.

The association of stockholders of the *North River Steam Boat Company*, is not a *copartnership*; but the parties are *tenants in common* of the property and franchises belonging to the company.

The *resolutions* passed at a meeting of the stockholders, by unanimous vote, on the 13th and 14th of *April*, 1817, and subscribed by all of them, are the *fundamental* articles, or *constitution* of the company, by which the former articles of agreement of the 26th *July*, 1814, were abrogated:—And they cannot be changed or altered but by the unanimous voice of all the stockholders. Therefore, certain *resolutions* passed the 6th *May*, 1819, not having been consented to by all the stockholders, and being repugnant to the *fundamental* articles of the association, are null and void.

BILL filed *July* 22d, 1819, against *Robert L. Livingston*, the executors of *R. Fulton*, *Dominick Lynch, Jun.* and others, stating, among other things, that on the 25th of *July*, 1814, the plaintiff, the defendant *R. L. Livingston*, and *R. Fulton*, since deceased, were sole proprietors of certain exclusive rights to navigate with steam, &c. secured by sundry patents from the *U. S.*, and by grants and acts of the legislatures of the different states, and particularly of this state, to *R. Fulton* and *R. R. Livingston*, deceased, whose heirs and assigns, the plaintiff, and the defendant *R. L. L.*, are owners of one undivided moiety thereof. *August 20th.*

That with a view, amongst other things, to constitute a separate concern, as to so much of the said rights as respected the navigation by steam boats on the *Hudson* river, between the City of *New-York* and *Troy*, and the intermediate places, *R. F.* and the plaintiff, and the defendant, *R. L. L.*, on the 25th of *July*, 1814, entered into articles of agreement, under their hands and seals. This agreement, which was set forth in the bill, recited, that whereas the par-

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ties being proprietors and acting partners of and in the rights, privileges, &c. it was agreed that the rights, &c. on the *Hudson* river, between *New-York* and *Troy*, &c. and the boats, &c. should be a separate concern from their rights, &c. in other places; and should be divided into 1,640 shares, of 500 dollars each, one half of which were declared to be the property of *R. Fulton*; one fourth the property of the plaintiff, and one fourth of the defendant, *R. L. L.*; and the subscribers were to be at liberty to dispose of their shares, as they might deem proper. That *R. F.*, during his life, should have two voices in the management of the concern, as long as he continued to hold ten shares, and the other two one voice each, as long as they continued to hold five shares each, &c. That on the death of either of the parties, each heir or assign of the deceased, should have a voice in the concern, in proportion to the number of shares he or she should hold in the stock, each share being one voice, and then a majority of voices should govern the concern. But no heir or assign should have a control over the *Hudson* river concern, until the death of the contracting party from whom the share or shares held were derived, &c. And it was agreed, that the "duration of the *Hudson* river partnership be co-extensive with the grant from the state of *New-York*."

The bill further stated, that under this agreement, the profits of the concern were paid by the masters of the boats, directly to the parties, according to their respective proportions. That *R. Fulton*, before his decease, assigned sundry shares in the *Hudson* river concern to the other defendants named. That on the 13th and 14th of *April*, 1817, at a meeting of the stockholders, a new organization was agreed on between them, and certain *resolutions*, in the nature of a new agreement, were adopted and signed by all the persons holding shares in the *Hudson* river concern, except some holders of shares to an inconsiderable amount, who acquiesced therein. The preamble to these *resolutions*

was as follows: "At a meeting of the stockholders of the *North river steam boat company*, held on the 13th, and continued by adjournment to the 14th of *April*, 1817, convened for the purpose of organizing the company, and of adopting such rules and regulations, as should be deemed advisable, for the well managing the concerns of the said company, the following named stockholders were present: viz." naming them, being the plaintiff and all the defendants, except nine. By these resolutions, thirty-two in number, the capital stock of the company was declared to be six hundred thousand dollars, divided into one thousand shares, of six hundred dollars each: the number of shares set opposite the name of each subscriber to the resolutions, to be deemed his shares on that day. A president, secretary, and clerk, were to be annually chosen, and their duties were prescribed. The third resolution, which gave the secretary a salary of one thousand dollars per annum, made it his duty to attend the meetings of the company, to keep a record of the proceedings, "to see that the resolutions of a majority of the interest of the concern be carried into effect;" keep a regular transfer book, &c. Monthly meetings of the company were to be held in the City of *New-York*, at which meetings the stockholders were to vote in person or by proxy. The masters of the boats were to deposit the whole amount of their receipts, on their arrival at *N. Y.*, in the *Manhattan Bank*, to the credit of the *North River Steam Boat Company*, and all drafts on the funds in the bank were to be signed by the clerk and countersigned by the secretary, &c. Various regulations for the conduct of the different officers, masters of the boats, &c. were prescribed, and their respective duties defined. The defendant, *R. L. L.*, was appointed president; the defendant, *Lynch*, secretary; and *A. N. Hoffman*, clerk, with a salary of 1,500 dollars, &c.

The bill further stated, that by this arrangement the name of the concern was changed to that of the "*North River Steam Boat Company*," the number and amount of shares

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shared, and officers appointed. That the plaintiff waived a portion of his right under the articles of the 25th of July, 1814, with a view to place the concern on a permanent basis, so as to prevent collision, and especially, so as to secure the monies arising from the employment of the boats, from the hazard of perversion or loss. That under the agreement and resolutions of the 14th of April, 1817, the boats were kept employed, and the masters deposited the receipts respectively in the *Manhattan Bank*, and, afterwards, by the consent of the stockholders, in the *Bank of New-York*, to the credit of the *North River Steam Boat Company*; and the supplies, except such as were permitted by the masters to be made in cash, were procured by the clerk, and the monies drawn out by the check of the clerk, countersigned by the secretary, until the 5th of May, 1819.

The bill then charged, that the defendant, *D. Lynch*, acting as secretary of the company, on or about the 5th of May, 1819, under pretence of authority derived from the stockholders of the company, and under pretence that he had, as secretary, authority to carry into effect the resolutions of a majority of the stockholders, caused *A. N. Hoffman* to be dismissed from his office of clerk and purveyor for the boats, and assumed upon himself the entire management and control of the boats, &c. &c. That the said *D. L.* gave notice to the masters of the boats to pay to him the whole moneys, receipts, and earnings of the boats, or else, to deposit the same, subject to his order, in the *Bank of New-York*, to a new account; changing the name of the said company to that of *Hudson River Steam Boat Company*, to the credit of which name and account, he had directed the moneys to be deposited; subject to be drawn out by his own check; and had taken on himself exclusively, the right of furnishing supplies for the boats, and settling and paying all accounts, &c. thereby destroying all the checks against mismanagement, provided by the agreement and resolutions of the 14th of April, 1817. That the plain-

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off, in consequence of those acts of *D. L.*, gave notice to the masters of the boats to retain and deposit in the *Manhattan Bank*, his proportion of the receipts, with intent to preserve his rights, until the resolutions of *April 14, 1817*, should be restored, or his rights under them enforced. That since such notice, *D. L.*, and others connected with him, had threatened the masters of the boats, that unless they paid over to *D. L.* the whole of the moneys received by them, including the proportion of the plaintiff, and conforming implicitly to his directions, they should be dismissed, and others appointed in their stead. That the said *D. L.*, in justification of his conduct, sent to the plaintiff a copy of certain resolutions, dated the 5th of *May, 1819*, signed by a number of the stockholders, and to which the secretary was requested to obtain the signatures of other stockholders, not present at the meeting. That the plaintiff wrote to *D. L.* disapproving of the resolutions, and of his conduct, and insisting on a strict compliance with the agreement and arrangement made by the resolutions of the 14th of *April, 1817*. That although by the resolutions of the 14th of *April, 1817*, the president and secretary were to be annually appointed, and *R. L. L.*, and *D. Lynch*, were then respectively appointed to those offices, the term of which expired in *April, 1818*, yet they had never been re-appointed, at any regular meeting of the stockholders, nor any other persons appointed in their places. That the resolutions purporting to be passed at a meeting of the stockholders on the 5th of *May, 1819*, were not proposed or submitted, at any monthly or regular meeting of the stockholders of the company, previous to the said 5th of *May*, for their consideration, nor was such meeting, on the 5th of *May*, one of the monthly meetings designated by the resolutions of the 14th of *April, 1817*. That a majority of the stockholders who subscribed to the resolutions of the 5th of *May, 1819*, were induced to do so by misrepresentations, and supposing that

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it was a matter of general arrangement and acquiescence. That the plaintiff, and a majority of the stockholders, had no notice of any intent to pass, or adopt such resolutions, until a copy of them was presented to them for their signatures; that these resolutions of the 5th of *May*, 1819, were entirely irregular and void; and the plaintiff insisted, that the resolutions of the 14th of *April*, 1817, are, notwithstanding the said resolutions of the 5th of *May*, 1819, in full force, and obligatory on the proprietors and stockholders; and that, by the true construction thereof, the fundamental articles of that agreement, which regard the permanent constitution and organization of the association, cannot be altered or changed, unless by the assent, in writing, of all the stockholders; at least, that no alteration thereof could be made, except by the vote of a *majority in interest*, of the stockholders, at a regular monthly meeting, and after the proposed alteration had been submitted at a previous regular monthly meeting, so that the same might be maturely considered, &c. &c.

The bill *prayed*, that the resolutions of the 5th of *May*, 1819, and any other resolutions and acts of the defendants, or any of them, inconsistent with his rights, and repugnant to the resolutions of the 13th and 14th of *April*, 1817, might be set aside, and declared null and void; and that the resolutions and agreement of the 13th and 14th of *April*, 1817, may be confirmed and established, and be carried into specific execution. That the several masters of the boats, in conformity thereto, may be directed to deposit the receipts and profits which may come into their hands, in the *Bank of New-York*, to the credit of the *North River Steam Boat Company*; that the said bank be enjoined from paying out the same, or any part thereof, except upon the draft or order of the clerk, countersigned by the secretary of the company. That the said *D. Lynch*, and his agents, be enjoined from acting under, or in pretence of the resolutions of the 5th of *May*, 1819, and from receiving any moneys from the mas-

ters of the boats, &c. or from drawing out, or otherwise obtaining or receiving any moneys belonging to the said company, from the *Bank of New-York*, except upon the checks or drafts of the clerk, countersigned by the secretary; and that *D. L.* be enjoined from displacing, or removing, or attempting to displace or remove, any of the masters of the said boats, or any of them, or otherwise interfering with their duties, except when duly authorized to do so, pursuant to the resolutions of the 14th of *April*, 1817. Or, in case those resolutions have, in any way, been waived or rescinded, then, that the plaintiff's rights, under the articles of agreement of the 25th of *July*, 1814, may be established and declared, and that the plaintiff be permitted, thereunder, to receive directly from the masters, his proportion of the moneys, which shall be received by them, deducting his proportion of the expenses; and that the said *D. L.* be restrained from exacting and receiving, and the said masters from paying to him, or to his order, such proportion of the plaintiff. And that the masters of the boats, or such of them as it shall appear to concern, may come to an account with, and pay over to the plaintiff, any moneys which may appear to belong to him, &c. And for general relief, &c.

The bill was taken *pro confesso*, against *R. L. Livingston* and *Cornelia Juhel*. The other defendants appeared, and answered, and general replications having been filed, and testimony taken, the cause came on to be heard on the pleadings and proofs.

Slosson, for the plaintiff, contended, 1. That the stockholders of the company, being tenants in common of the property and franchises belonging to them, the assent of all of them to the agreement and resolutions of *April*, 1817, was necessary. Independent of any agreement, each tenant in common has the entire dominion over his own share

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or proportion, and neither of them can do any act to bind or regulate the interest of the others without his assent. *Kyd*, (on *Corp. vol. 2. p. 95. chap. 3. sect. 10.*) says, "there are some societies which are formed by the voluntary association of the members: and there are communities which have a known description, and are recognized as forming part of the general constitution of the country: the former must have their rules or by-laws as well as the latter; but they receive no aid from the general law of the land to enforce obedience to their rules, and they have no ultimate remedy against disobedience, but the expulsion of the disobedient member." This doctrine was fully recognised by Lord *Eldon*, in *Lloyd v. Loaring*, (6 *Vesey*, 773. 777.) That was a case between the members of a society of *Freemasons*. "If I consider them," says Lord *Eldon*, "as individuals, the majority had no right to bind the minority. One individual has as good a right to possess the property as any other, unless he can be affected by some agreement." *Abbot*, (on *Ships, part 1. ch. 3. sec. 2.*) says, "a personal chattel, vested in distinct proprietors, cannot possibly be enjoyed advantageously by all, without a common consent and agreement among them: to regulate their enjoyments, in case of disagreement, is one of the hardest tasks in legislation; and it is not without wisdom, that the law of *England*, in general, declines to interfere in their disputes, leaving it to themselves, either to enjoy their common property by agreement, or to suffer it to remain unenjoyed, or to perish by their dissension, as the best method of forcing them to a common consent, for their common benefit." In the *Chamberlain of London's Case*, (5 *Co.* 63.) it was held, that the inhabitants of a *town*, which comes within the distinction of *Kyd*, "as a community of known description recognized by law, might make ordinances or by-laws for the reparation of the church, or a highway, or of any such thing, which is for the general good of the public; and, in such case, a greater part shall bind the whole, without

any custom ; but if it be for their private profit, as the well ordering of their common of pasture, or the like, there, without a custom, they cannot make by-laws : and if there be a custom, then the greater part shall not bind the less, if it be not warranted by the custom." Such is the uniform language of the books. The majority cannot make by-laws, or pass resolutions binding on the minority, unless there be some special agreement, or custom, or grant from the legislature, for that purpose. Lord Eldon, (6 *Vesey*, 778.) says, the Court would take notice of the joint interest of individuals in a chattel, and of agreements upon it, not with reference to them as a voluntary society, but as individuals. Referring to the case of *Fells v. Read*, (3 *Vesey*, 70.) he observed, that it was the duty of Courts, not to permit a voluntary society to assume the character of a corporation on the record.

The only exceptions to this general rule, that the majority cannot bind the minority, without a special agreement, are the cases of a *partnership*, where the interest is *joint*, not in common, and of the part owners of a ship. In the former case, the principle is not that a majority can bind the minority, but that each partner, having a joint interest in the whole concern, may bind all the partners. The case of ships rests on peculiar grounds ; it being a rule of maritime law, founded in public policy, that ships are built "to plough the ocean, and not to rot by the wall." And the nature of the enjoyment of the common property in ships, shows the distinction in regard to other cases. If all do not agree to send the ship on a voyage, the dissentient part owner is not obliged to share in the risk of the adventure, nor will he participate in the profit of it. He may require the other part owners to give security for his interest. But even in this case, if there is a settled agreement among them, as to the employment of the ship, the majority cannot control, but the agreement is to be enforced, as in all other cases, according to the rules of law. (*Abbot, ubi supra.*)

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2. The resolutions of *April*, 1817, which were unanimously agreed to by the stockholders, and which form, the fundamental articles or constitution of the company, cannot be altered, without the like unanimous consent, or in the mode prescribed by those resolutions. It is expressly provided, that there shall be monthly meetings; and that it shall be the duty of the secretary to see that the resolutions of the majority in interest in the concern, be carried into effect. But any number of stockholders less than the whole, cannot alter, or rescind those *fundamental* articles of association. The express assent of the whole was necessary to their formation; and it is only by a like assent that they can be changed. *Solvitur eo ligamine quo ligatur*. A power may, undoubtedly, be given by express agreement, to a majority to bind the minority, and this Court would enforce such an agreement; but such a power must be clearly shown and established, for it is in derogation of the legal and natural rights of the minority. Such an agreement, however, is not to be enforced on the ground of a right in the majority to bind the minority, but as an agreement merely of the whole, the minority being considered as having assented to, and become parties to the new resolutions formed pursuant to the fundamental articles.

If such a power exists in a majority to alter or rescind the resolutions of *April*, 1817, it must either be given in express terms, or result, irresistibly, from the nature of the agreement. The only resolution which at all adverts to such a power, is the *third*, which has been mentioned. That manifestly refers only to such directions or resolutions of the majority of the concern, as shall be made at the regular monthly meetings acting under the constitution of the company. The preamble to the resolutions of *April*, 1817, shows, that they were made for the organization of the company. The acts done at any monthly meeting, must be under the constitution. It would be absurd to suppose, that a majority

at a monthly meeting, could abolish the office of secretary, and yet, that the secretary must carry that resolution into effect.

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Nor does the 31st resolution give such a power. It provides, "that all propositions for an alteration of the resolutions of the company shall be submitted at one of the monthly meetings, and shall not be acted on until the next monthly meeting." It does not, in terms, give the majority any power to alter or rescind the resolutions; and unless expressly given, the power cannot be claimed or exercised. But it is obvious, that this resolution was intended merely to guard against precipitancy in the proceedings of the company, and to give each individual time for deliberation on the expediency of any such proposition, before he was called upon to vote upon it. That the defendants themselves understood that no alteration could be made without the assent of all the partners in interest, is evident from the letters of *D. L.* to the plaintiff. Such was the opinion not only of Lord *Eldon*, but of the Court of K. B., in the case of *Davies v. Hawkins*, (3 *Maule & Selwyn*, 488.) There was an association of 600 persons, who made subscriptions in shares, for the establishment of a *brewery*, and the subscribers entered into an agreement by deed, for the management of the concern, one of the terms of which was, that the conduct of the business should be confined to two persons, styled *brewers*, who were to carry on the trade in their own names, as trustees, &c. A committee was appointed, with full powers to make by-laws, &c. subject to the confirmation of a majority of the proprietors, at a quarterly meeting. At such quarterly meeting, on the recommendation of the directors who had power to regulate the general affairs and business of the company, *one* only, instead of *two*, was appointed to conduct the business as brewer. The Court held, that this could not be done, as it was an alteration in the constitu-

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tion of the company, which could not be made without the consent of the whole body of subscribers.

3. But, in any event, the resolutions of the 5th of *May*, 1819, were irregular and void, since the 31st resolution of *April*, 1817, required, that all propositions for any alteration should be made at a monthly meeting, and not be acted upon until a subsequent monthly meeting. The meeting at which those resolutions were passed, was not a monthly meeting, nor were a majority in interest of the stockholders present.

T. A. Emmet contra, contended, that the agreement of the 25th *July*, 1814, was the constitution of the association, so far as regarded the *North River* concern. That agreement recites that the parties are *partners*. They are not, therefore, to be regarded as tenants in common. The rights are divided into 1640 shares, and apportioned to each of the proprietors. The *second* article of the agreement provides for the event which gave rise to the present association. In case of the death of either of the contracting parties, each heir or assign (and those who purchased of *F.* are the assigns) of the deceased, were to have one voice, for each share owned by him ; and "then a majority of the voices shall govern the concern." Previous, then, to the resolutions of *April*, 1817, the plaintiff, by an instrument under his hand and seal, recognised himself as a *partner*, and stipulated that the concern should, in every thing, be governed by a majority of shares. Those, therefore, who afterwards bought rights of *F.* purchased also, the valuable privilege, that the majority of shares should govern. This was a *fundamental* article of the association, and adopted with a view to the subsequent disposition of the shares by the Messrs. *L's. & F.* and the plaintiff must be bound by it, until he can induce all the stockholders to change *in eo ligamine quo ligatur*. The parties met in *April*, 1817, under this previously established rule and compact that the majority of shares should govern ; and the resolutions were

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passed as the act of a majority, and derived their strength and binding force from their being an act of the majority. If, then, a majority in interest had a right to make these resolutions, such majority had a right to alter or annul them, or any one of them, and to substitute others. The authorities, therefore, which have been cited, do not apply to this case, for the right of the majority to govern was previously established as a fundamental article of the association; and, in fact, the course of proceeding adopted by the defendants, has been sanctioned by the agreement of all parties. The constitution or basis of the association is the agreement of the 25th July, 1814. The resolutions of April, 1817, are in the nature of *by-laws*, for the better management of the business, and might be altered, from time to time, to suit the business, by the whole or by a majority in interest of the stockholders, either at a monthly meeting or in any other way, clearly showing the deliberate consent of a majority; and, therefore, since the discontinuance of these meetings, by meetings not monthly, or by written resolutions signed by a majority in interest. The plaintiff, by his agreement of July, 1814, was bound to abide by the regulations prescribed by a majority in interest of the stockholders, when their will was clearly expressed and ascertained; and he cannot be heard in this Court to claim rights in opposition to his solemn agreement.

But the "act to incorporate the *North River Steam Boat Company*," passed the 10th March last, renders any further discussion unnecessary; for this Court cannot admit the allegation of the plaintiff, that he is not a corporator, because he has not assented to the act of incorporation, and refuses to become a party to it. The act expressly declares, that all persons who then were, or at any time thereafter might be stockholders of the *North River Steam Boat Company*, should be, thereby incorporated. (a)

(a) While this suit was pending, the defendants applied to the legislature, and obtained an act incorporating the company; but the

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To decide on the character of the resolutions of *April*, 1817, it is necessary to consider the distinction between a constitution and a by-law. Constitutions are agreements under which states or persons, having no previous bond of union, associate or unite, either for government, protection, or acquisition of property. The acts which they adopt for their guidance and management, afterwards, are called laws and by-laws; the former for states, the latter for individuals. The parties in this cause, as the bill stated, were previously united, constituted or connected by an agreement binding on the plaintiff, and on all the parties having interests in the subject matter, not derived, as to any of the defendants, from the plaintiff. These resolutions did not constitute the parties proprietors, for they were already such. They merely prescribed, as the *preamble* to them says, "such rules and regulations as were deemed advisable for the well managing the concerns of the said company;" that is, they are by-laws for the management of the joint property, and there is not one of the resolutions that is entitled to be called a *fundamental* article. That they are merely by-laws, is apparent from the 3d and 31st resolutions, admitting the right of a majority to govern and alter under the agree-

plaintiff refused to join in the application, or to become a corporator. The seventh section of the act (*sess.* 43. *ch.* 84.) provides: "That if the rights, powers and privileges of the respective proprietors or stockholders of the *Steam Boats* employed in the navigation of the *Hudson River*, as at present possessed and exercised, in pursuance of any agreement, contract, or authority whatever, are not continued and secured to them by by-laws, or otherwise, as fully under this incorporation, as they are entitled thereto before the passing of this act, it shall and may be lawful for the party aggrieved to make application to the *Chancellor*, who shall have power and authority to order the *Directors* of this incorporation to carry the requisitions of this section into effect: and in case they shall refuse so to do, the *Chancellor* shall have power and authority to declare this act null and void; and thenceforth this law shall be taken and deemed to be null and void."

ment of the 25th *July*, 1814, and pointing out the mode in which alterations were to be made. If, then, those resolutions are by-laws, and if, according to the third article, a majority are to govern, the resolutions of the 5th *May*, 1819, are legal and binding, for they have been approved or signed by all the stockholders, except the plaintiff. But it is said that these resolutions were not passed at a regular monthly meeting, pursuant to the 31st resolution of *April*, 1817. It appears to have been the intention to have held regular monthly meetings according to that resolution, and to have submitted all matters previous to voting on them ; but it appears, also, from the answers of the defendants, and the evidence of Mr. *Hoffman*, that these monthly meetings being found inconvenient and impracticable, were, by general consent, discontinued after *July*, 1817 ; and the business of the company, by common consent, has since been transacted, either at meetings specially called for the purpose, or by written resolutions prepared by persons proposing them, and transmitted to all the stockholders. The bill admits that changes have been made in this way. The second and third resolutions, after the first meeting, were never acted upon, and the officers held over to the time of the act of incorporation ; and the plaintiff has approved of it, by various ways, by receiving dividends, and attending subsequent meetings, &c. *Hoffman*, in his testimony, states a number of alterations of the resolutions of *April*, 1817, not proposed or made at any regular monthly meeting ; and at most of those meetings the plaintiff was present and assenting. The plaintiff ought not, therefore, to be allowed to object to the resolutions of *May*, 1819, on the ground that they were not prepared at a regular monthly meeting :

1. Because, he has concurred in the discontinuance of those monthly meetings, and in the mode substituted for the transaction of business, and is bound by his agreement to submit to the will of the majority, so declared and ascertained : 2. Because, in his letter of the 10th *May*, he did

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not make that a ground of objection, and did not state it, until the filing of his bill : 3. Because, he has approved of part of the resolution of *May*, 1819, and has thereby waived any right he may have had to make the objection. It is said, that the 31st resolution of *April*, 1817, is fundamental, because it secured mature deliberation and reflection on all measures proposed. Does not the mode of submitting propositions to each stockholder, in the form of written resolutions, for his consideration, equally, or in a greater degree, secure deliberation and reflection ? The resolutions of *May*, 1819, embraced three points : 1. The removal of *Hoffman* as clerk and purveyor : 2. The demanding and receiving from the captains of the boats, an assignment of the contract for conveying the mail : 3. Requiring from *Hoffman & Van Buren* payment of the balance due from them. It is to the *first* only of these alterations, that the plaintiff has objected. How can the removal of this individual be a violation of the fundamental articles of the association ? The counsel here went into an examination of the facts, and a particular discussion of the different resolutions, and of the conduct of the parties.

*Wells*, in reply, said, that the assertion that the parties were *partners*, not tenants in common, was unfounded. The use of the word "partners," in the preamble to the resolutions, did not make them so. Besides, if they were partners, how do all those defendants who claim as purchasers under the late Mr. *Fulton*, make title to their shares ? If it was a partnership property, the whole of the interest of *F.* survived to the plaintiff and *R. L. L.* But it is manifest that the word "partners" is used accidentally and inartificially, as meaning only, that they were interested and acting together in a common concern. The use of the words cannot alter the intrinsic nature of the property, or the tenure by which it was held.

Instead of denying the conclusion of the opening counsel, the defendant's counsel deny his premises. They deny

that the resolutions of *April*, 1817, were the constitution, or fundamental articles of the association ; and they go back to the agreement of *July*, 1814, which they denominate the constitution ; and treat the resolutions of *April*, 1817, as mere by-laws. The principal object of the agreement of *July* 1814, was to regulate the enjoyment of the property during the joint lives of the owners. When, in the event of the death of one of the parties, a majority of the stockholders was to govern, it was obviously intended that they were to govern by ~~some~~ new rules, not to be found in an instrument applicable only to the original proprietors, and not intended to govern the rights and interests of persons newly added to the old remaining proprietors. Accordingly, after the death of *F.* neither the surviving proprietors, nor the defendants claiming under him, thought of regulating their concerns by the agreement of *July*, 1814. They met on the 13th and 14th *April*, 1817, "for the purpose of *organizing* the company, and adopting such rules and regulations as should be deemed advisable for the well managing of its concerns." An entire new agreement was formed and substituted, the number of shares was reduced, the price of them altered ; a new stock was created, in which each owner is put on an equality in proportion to his interest. A mode of transfer is prescribed, and each purchaser is to succeed to the rights of the original owner, &c. The whole scope of the resolutions of *April*, 1817, shows clearly the intention to abrogate all prior agreements, by an entire new organization, placing each proprietor on the equal footing of a tenant in common, and to form a bond of union, in the future management of their common interests. All the parties treated it as an establishment then first formed, and the resolutions are not of a society already organized, but of one organizing itself. The plaintiff, on entering into this new compact, voluntarily surrendered powers guaranteed to him by the agreement of *July*, 1814, with a view to conciliation, and in consideration of the new compact offered in their stead.

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Besides, not one of the defendants, except, perhaps, the counsel himself, pretends ever to have seen the agreement of *July*, 1814, or to be acquainted with it: nor does the counsel regard it as fundamental, or the constitution, on which his rights are founded. He claims nothing under it, though he admits its existence: a majority of the defendants, in their answers, insist, that the articles of *July*, 1814, "are not binding or obligatory upon them and the other stockholders, further than they are recognised in, and adopted by, the resolutions of the 13th and 14th *April*, 1817." Now, the articles of *July*, 1814, are no where mentioned or referred to in the resolutions of *April*, 1817. Several of the other defendants, in their answers, insist, "that by the resolutions of the 13th *April*, 1817, the articles of agreement of *July*, 1814, if any such existed relative to the *Steam Boat* concern on the *Hudson River*, were wholly abrogated, and rendered null and inoperative, and could in no wise bind or affect any of the proprietors of the new association formed on the 13th and 14th *April*, 1817." It is idle, then, in the face of these answers, to argue that an agreement, which they insist is abrogated, and inoperative, is the constitution by which their rights are to be ascertained and secured. But it is said that these resolutions are mere by-laws. But what did the parties mean when they declare that they met on the 13th and 14th *April*, 1817, for the purpose of "*organising* the company," and making "rules and regulations," for the well managing of its concerns? Much stress is laid on the third resolution, as to the secretary being directed to carry into effect the resolutions of a majority in interest, and in reference to the agreement of *July*, 1814. But the resolutions themselves contain no reference to that agreement. At most, the third resolution could only mean such resolutions as the majority might lawfully and rightfully pass, according to the constitution of the company. Nothing was said at the meeting about a majority. The resolutions were signed by all the stockholders, who affixed to their names the

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number of shares owned by them, thereby expressing the consent of each individual to this original compact of their association. This being established, it follows, that no alteration can be made in any of these fundamental resolutions, without the consent of every stockholder, and this general principle rests on the common law doctrine as to tenants in common.

But, it is said, that the plaintiff cannot now object to the resolutions of *May*, 1819, because he had acquiesced in the discontinuance of the regular monthly meetings, and did not make his objection before filing his bill, and because, by assenting to a part of those resolutions, he has waived his right to object. Persons acting together in any particular business, may, in some instances, from negligence or ignorance, suffer their affairs to be irregularly conducted, but, though bound as to what is past, they have a right to stop, at any time, refuse to countenance further irregularity, insist on correcting their errors, and on bringing themselves and their associates back to the strict observance of the original and fundamental rules of their association. It is a dictate of good sense, and that practical wisdom which the law approves. The counsel next discussed various grounds of altercation between the parties, and vindicated the conduct of the plaintiff, in the support of his legal and just rights.

THE CHANCELLOR. The object of the bill is to reinstate the plaintiff in certain rights which he claims under the resolutions of the 13th and 14th of *April*, 1817, relative to the appointment and removal of certain officers belonging to the *North River Steam Boat Company*, and relative to the security and distribution of the funds, and the general management of the concern.

The great point is, whether the resolutions of the 13th and 14th of *April*, were to be regarded as fundamental articles, or the constitution of the company, requiring the unanimous consent of all the members of the company, to

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alter, as well as to establish them, or whether they were to be regarded merely as by-laws, subject to the control of a majority in interest of the association. On the solution of this point depends the validity of the resolutions of the 5th of *May*, 1819, of which the plaintiff complains.

It appears to me most clearly, that the association is not, in judgment of law, a partnership with either the rights or responsibilities belonging to that commercial relation. If that were the case, each member would have a joint interest in the whole partnership stock and concern, and could aliene or bind the whole interest. One partner may pledge the credit of the others to any amount, and each partner commits his entire rights to the discretion of each of his co-partners. There is no colour for this conclusion in this case. The evident character of the members of the company is that of tenants in common, in which each has a distinct, though undivided interest in the establishment, and an entire dominion over his own share or proportion of the property; but without any of right or power to bind the interest, or regulate the enjoyment of the property of the other members. The resolutions of the 13th and 14th of *April*, derived their binding force and obligation upon all the members of the company, from the fact that they were agreed to and signed by all. The members met, and acted on that occasion as independent tenants in common; and from the nature and language of those resolutions, it is quite apparent they were intended to be permanent regulations for the future government of the company, and not subject to alteration, but by the same united will by which they were ordained.

The three persons owning, in 1814, the steam boat property and franchises on the *Hudson* river, were not partners under the articles of agreement of the 25th of *July* of that year. They never intended to subject themselves individually, to the risks, and to the alarming powers given to each member of a partnership, by the policy of commercial law.



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They treated with each other, and acted in that case, in the regulation of their interest, as tenants in common. Though they speak of themselves as "the sole proprietors and acting partners" in the steam boat rights and privileges, and of the *Hudson* river establishment as a "partnership," yet, it is evident, that they used the terms *partner* and *partnership*, in some popular, not in a legal or technical sense, and without meaning to attach to their association any one quality or mark of a partnership. By those articles, the number of shares belonging to each member was ascertained, and it was added, that he might "dispose of any number of said shares *he may possess*, that he should think proper; but if he should part with the whole of his shares, he should, from that time, cease to have any further management in the *Hudson* river concern." This was declaring the true character and interest of a tenant in common. So, the provision that the shares of each of those members should, on his death, descend to his heirs, was founded entirely upon the contemplation of a tenancy in common. This agreement of 1814, regulated the amount and distribution of the capital, and the number of votes each member was to have during the joint lives of the contracting parties, and the variation that was to take place on the death of either of them, when the heirs or assignees came to vote; and it provided, that *a majority of voices should then govern the concern*; But how govern it? Certainly not in violation of those permanent provisions establishing the amount of shares in the *North River Steam Boat* navigation, as a distinct and separate concern, and providing, after the admission of the heirs or assignees of a party who may have died, that the surviving contracting parties should be considered equal to as many votes as he had shares allotted to him by the agreement. It is evident, that the majority of voices was to govern only in respect to the administration of the business of the concern under

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this agreement; and the provision was intended to dispense with the inconvenience of requiring, on every occasion, the consent of every member. The resolution of the majority, in pursuance of such a fundamental provision, stands for the will of the whole, it being the will of the whole that the majority should govern in such cases.

If, therefore, we were to recur to the agreement of 1814, for light or assistance in the construction of the resolutions of 1817, it would not afford any strength to the pretensions of the defendants under those resolutions. But, in fact, there is not any relation or connection between the two agreements; and the defendants, in their answers, have rested their rights entirely upon the resolutions of 1817.

The defendants, *R. L. Livingston* and *Cornelia Jubel*, have suffered the bill to be taken *pro confesso*; and they, with the plaintiff, own a majority of interest in the whole concern; that majority, therefore, either contend or admit that the resolutions of *April*, 1814, were a new organization of the company, and composed a new constitution for its future government. Most of the defendants who have answered the bill must have formed the same conclusion, for they deny any knowledge, other than what is given by the bill, of the agreement of 1814, and they insist that it is "not binding or obligatory upon the company, farther than the same is recognized and adopted by the resolutions of 1817." Nay, several of the defendants insist, that by the adoption of the resolutions of *April*, 1817, "the articles of agreement before that time existing between the three parties to those of 1814, relative to the steam boat concern, were wholly abrogated, and rendered null and inoperative, and could, therefore, in no way bind or affect any of the proprietors in the new association formed in *April*, 1817."

The resolutions of 1817 purport, upon the very face of them, by their language, by the whole detail of the provisions, and by the unanimity required and given, to have been fundamental articles, or the constitution of the compa-

ny. Every distinguishing character of the former association was destroyed. It was a meeting of the stockholders "convened for the purpose of organizing the company, and of adopting rules and regulations for the well managing the concerns of the said company." The capital stock, under the former establishment, was reduced, a new stock re-ated, and the number of shares designated into which it was to be divided. There was to be an annual president, to preside at all meetings, and a secretary, to be annually chosen, with a declared salary, and whose duties were prescribed. There was to be a clerk, whose duties were also prescribed. The monthly meetings were regulated; and at such meetings, the absent stockholders might be represented by proxy or attorney. The captains of the steam boats were directed where to deposit their moneys, and the mode of drawing and distributing the funds was specially provided. The general duties of the captains were also particularly noticed, and all the officers of the company were appointed by name, and their compensation fixed. And it was finally provided, that all propositions for an alteration of any of the resolutions of the company, were to be submitted at one of the monthly meetings, and not to be acted on until the next meeting.

I think there cannot be a doubt upon any mind, after perusing these articles, and connecting them with the admissions in the answers, that they are of the character and authority of permanent constitutional provisions, binding upon all the members, when adopted by all, as a solemn private contract; and that they can only be abolished by the like concurrent will by which they were adopted. If these are not of the nature, and do not partake of the force of fundamental articles, it is not in the power of any private association to have any. None can be drawn more essentially specific in their details, or more stable and directory in their views. When it is declared in one of these resolutions, prescribing the duties of the secretary, that he was "to see that

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the resolutions of a majority of the interest of the concern be carried into effect," it certainly could have referred only to resolutions passed in the ordinary transactions of the concern, and in perfect subordination to all and each of these articles of the original compact. We are not to intend, without express words, that each of these tenants in common, especially where the interests were so unequal and so momentous, surrendered his invaluable right, founded on settled principles of law, not to be controlled in the government of his individual interest, without his consent.

The general principle of law is, that in such private associations, the majority cannot bind the minority, unless it be by special agreement.

Lord Coke (*Co. Litt.* 181. b.) took the distinction between public and private associations, and admitted, that in matters of public concern, the voice of the majority should govern, because it was for the public good, and the power was to be more favourably expounded than when it was created for private purposes. In *Viner*, (tit. *Authority B.*) we have several cases marking the same distinction; and it is now well settled, that in matters of mere private confidence, or personal trust or benefit, the majority cannot conclude the minority; but where the power is of a public or general nature, the voice of the majority will control, on grounds of public convenience; and this is, also, part of the law of corporations. (*Attorney General v. Davy*, 2 *Atk.* 212. *The King v. Beeston*, 3 *Term Rep.* 592. *Withnell v. Gartham*, 6 *Term Rep.* 388. *Grindley v. Barker*, 1 *Bos. & Pull.* 229. *Green v. Miller*, 6 *Johns. Rep.* 39. 5 *Co.* 63. a.) In *Lloyd v. Loaring*, (6 *Vesey*, 773.) there was a suit by three persons, on behalf of themselves and all the other members of a lodge of free masons, and Lord Eldon observed, "that if he considered them as individuals, the majority had no right to bind the minority. One individual has as good a right to possess the property as any other, unless he can be affected by some agreement." Mr.

*Abbott*. (*Law of Shipping*, part 1. ch. 3. s. 2.) admits the extreme inconvenience, under the law of *England*, of enjoying personal chattels vested in several distinct proprietors, without a common consent and agreement among them.

But the case most applicable to the one before us, is that of *Davis v. Hawkins*. (3 *Maule & Selw.* 488.) A company was formed for brewing ale, and by deed they confided the conduct of the business to two persons who were to be trustees of the company. General quarterly meetings of the company were to be held. It was resolved by the K. B., that one person only could not be appointed at a general quarterly meeting, in place of the two originally appointed under the deed, unless such alteration was made by the consent of all the subscribers. Lord *Ellenborough* said, that "a change had been made in the constitution of this company, which could not be made without the consent of the whole body of the subscribers. It was such a substituted alteration in its constitution, as required the assent of all."

The resolutions of the 5th of *May*, 1819, were irregularly passed, even assuming them to have been passed by a majority. There was not a majority of the stockholders in interest present on that day, nor was the meeting a regular one, according to the constitution of the company. Though the resolutions may have been signed by a majority in interest, (which, however, does not appear,) the signatures or assent of members were obtained separately, in detail, and not given by them in their collective capacity. They had not the advantage of mutual discussion; and all the checks provided by the resolutions of 1817, against abuse, and to ensure mature deliberation, were prostrated. It was an extremely precipitate proceeding, and to make out the assent of even a majority in interest, the defendants refer to a letter of one of the stockholders, as amounting to such assent. It would be impossible to afford sanction to the resolutions of the 5th of *May*, upon any known principle of law, or

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with due regard to the rights of property, or to the binding nature of a solemn private association and compact, having great interests under its care. The meeting which passed, or the members who signed these resolutions, seemed to be sensible, that the alterations they made in the permanent organisation of the company, ought not to be left to rest upon the declared will of a majority, for "the signatures of all the stockholders was to be solicited."

Nor does there appear to have been the requisite subsequent ratification of the alterations of *May, 1819*. The plaintiff has given no such ratification; and though acts may have been agreed to by all not strictly within the scope of the resolutions of 1817, those acts were only a waiver, for the particular occasion or purpose producing them; and every member of the company has a right to recur, when he pleases, to his rights as they were secured by the fundamental articles of the association. It is not perceived, however, that any act, on any occasion, has been unanimously assented to, affecting materially the constitution of the company.

In short, there is no just foundation for the doctrine, that the articles of 1817 could be controlled or abolished by the will of a part of the association. If any one article might be abolished by a vote of the majority, so might every other article; and the rights and property of each individual member would be placed in the utmost jeopardy, at the control of others, without any security from compact, or the dictates of his own judgment. The law gives no such control to others over one's own property, or undivided interest, except in the case of partnerships, and of ship owners, which stand on peculiar grounds of commercial and maritime policy; and, even in those cases, there is particular protection provided for the dissenting owner.

I shall, therefore, declare, in this case, that the resolutions of 1817 are valid and binding, until altered by unanimous consent; and that the resolutions of *May, 1819*, are

void ; and that the plaintiff is entitled to have the rights of the association replaced on their former basis.

The following decree was entered :

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"It is declared, that the parties to this suit forming the association in the pleadings mentioned, are tenants in common, having distinct but undivided interests in the property and franchises belonging to the company ; and that they have neither the rights nor responsibilities of partners, and no member has power, as a tenant in common, to dispose of any interest except his own, or to bind the association by his contracts. And it is further declared, that the resolutions in the pleadings mentioned, and stated to have been passed on the 13th and 19th of *April*, 1817, are the fundamental articles, or constitution of the company, passed by their unanimous voice, and requiring, upon established principles of law, the like unanimous voice to alter or repeal them ; and that the articles of agreement of the 26th of *July*, 1814, are not obligatory upon the company, and were abrogated by the adoption of the resolutions of *April*, 1817, and so it is admitted generally, by the defendants in this suit. And it is further declared, that the resolution which directs the secretary of the company to see that the resolutions of a majority in interest of the concern be carried into effect, has reference to resolutions passed under the authority of, and in conformity to, the provisions contained in the said articles of the 13th and 14th of *April*, 1817, and not to resolutions altering the same, or any part thereof. And it is further declared, that the resolutions in the pleadings mentioned, and purporting to have been passed on the 5th of *May*, 1819, being repugnant to some of the provisions of the said fundamental articles, and not having received the assent of all the members of the company as was intended in and by the same, and as was required by the rights belonging to each member, are null and void, and of no force or obligation upon the said company ; and that any acts of

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all the company, in any particular case, contrary to the provisions of the said fundamental articles, if any such there be, do not alter the force or obligation of the said articles, or the rights of the members of the company under them, in any other case in which the like unanimous consent may not have been given. And it is further declared, that the said resolutions of the 13th and 14th of *April*, 1817, and every part thereof, continue to be obligatory upon the company, and ought to be carried into specific execution, in every respect in which the same have not been or may not be altered or varied by the unanimous consent of the said company duly declared. It is accordingly *ordered, adjudged, and decreed*, that the said resolutions of the 13th and 14th of *April*, 1817, are binding upon the said company, being the parties to this suit, until changed or repealed by unanimous consent as aforesaid, and that the said resolutions of the 5th of *May*, 1819, are null and void; and that the said resolutions of *April*, 1817, be carried into specific execution, as to the deposit of moneys, and as to the drafts of those moneys, and as to the appointment and duties of the clerk, and in all other respects, *unless* they shall have altered or may alter the same in cases wherein they do not conform thereto, by unanimous consent as aforesaid; and that the injunction heretofore issued be continued, and the receiver heretofore appointed be continued, until the said company shall have so conformed to the said resolutions of the 13th and 14th of *April*, 1817, as aforesaid, with the exception as aforesaid. And it is further *ordered, adjudged, and decreed*, in pursuance of the provisions of the statute of the 10th of *March*, 1820, entitled, "an act to incorporate the *North River Steam Boat Company*," that the rights, powers, and privileges of the plaintiffs, and of each proprietor or stockholder in the company aforesaid, under the said agreement of the 13th and 14th of *April*, 1817, as above declared, be continued and secured to them, until changed or repealed by unanimous consent as aforesaid, whether the said association shall act as a private com-




pany, or as a corporate body under the said statute. And it is further ordered, adjudged, and decreed, that the defendant pay to the plaintiff his costs of this suit, to be taxed, and to be paid as well by the defendants who have answered, as by those who have suffered the bill to be taken *pro confesso*, and to be paid rateably, in proportion to their respective interest and shares, relatively to each other, in the said company."

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TENBROOK against LANSING and others.

The act passed the 12th April, 1820, (*sess.* 43. *ch.* 184.) directing the sheriff or other officer, where lands are sold by virtue of any execution, to delay giving a deed to the purchaser, so as to give the debtor time to redeem within a year, on certain terms, does not apply to the case of a sale by a master of mortgaged premises, under a decree of sale and foreclosure.

PETITION of *J. Lansing*, Junr. one of the defendants, September 6th: stating that the defendant *S. Lansing*, and his wife, on the 10th July, 1816, mortgaged to the plaintiff a farm in the town of *Bethlehem*, in the county of *Albany*, containing 83 acres, to secure the payment of 1060 dollars, with interest; and that on the 10th day of July, 1819, there were 108 dollars 96 cents of interest due. That the farm was purchased, in 1814, for 3000 dollars, and considerable sums of money have since been expended for repairs and improvements. That a bill of foreclosure has been filed, and a sale of the mortgaged premises decreed, to satisfy the monies due on the said mortgage. That the petitioner had acquired, by purchase, the equity of redemption. That the mortgaged premises were advertised for sale, on that day;

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(August, 18, 1820,) and praying that the act, passed the 12th April, 1820, entitled, "an act in addition to the act concerning judgments and executions," might be applied to the case, as coming within the equity of that statute.

On that petition, an order was entered that the master, on selling the mortgaged premises, forbear to execute a deed to the purchaser, until further order, and that he make a report of such sale to the Court, "to the end that the question of a right to redeem, under or within the equity of the statute, passed at the last session of the Legislature, may be considered."

The master sold, on the day of the date of the petition, and of the said order, under the decretal order of the 12th day of June last, to satisfy the principal, interest, and costs, the whole of the mortgaged premises to Samuel Van Orden, the agent for the plaintiff, for 1440 dollars.

Upon this case, the plaintiff moved, that the order suspending the execution of a conveyance by the master be discharged.

*A. Van Vechten*, for the plaintiff,

*J. Lansing*, Junr. *in propria persona*.

THE CHANCELLOR. This case is evidently not within the statute referred to. That statute applies only to sales on execution issued and directed to the sheriff or other officer; and this is not such a case. If we look through all the details of the act, we shall, in vain, search for any provision that shows an intention to apply the directions of the act to sales of mortgaged premises, made either by the mortgagee himself, under a power, or by a master under a decree. A sale by the master cannot be said to be a sale "by virtue of an execution," nor, in such a case, is there "an execution issued." And when the act speaks of "the duty of the she-

riff, or other officer who shall have sold, or his executors or administrators, to complete such sale by executing a deed," it can hardly be supposed that the act intended that the executors or administrators of a master were to execute a deed.

Nor is the case within the equity or policy of the act : mortgaged premises are not sold by any process which can properly be said to be judgments and executions at law, or perhaps like process of execution from this Court, to act *in invitum* ; for they are sold, and the equity of redemption barred, in pursuance of the express contract of the parties. The mortgagor agrees, that if he makes default in payment, the lands specified in the mortgage shall be sold, or his equity barred. The Court does no more than execute his specific contract. The lands are frequently sold by the mortgagee himself, under a power contained in the mortgage, or the equity of redemption may be barred, at the election of the mortgagee, by a strict foreclosure of that equity, without a sale, according to the uniform *English* practice, which continued until very lately, and which is according to the terms of the contract. In neither of these cases, can there be any pretence for the application of the statute. The Legislature, doubtless, intended to leave the case of mortgages untouched. They stand upon the footing of a contract, and the sale or foreclosure is part and parcel of that contract. Besides, it is the course and practice of the Court to enlarge the time to redeem, by extending the period of foreclosure, or the time for sale, on a bill to foreclose, if application be previously made, in due time, and on reasonable grounds, such as bringing into Court the arrears of interest and costs.

No such application was made in this case, to the discretion of the Court. But on the morning of the sale, an application is made to apply the provisions of the act of the last session, which permits the sale, but postpones the execution of the deed. I am, accordingly, of opinion, that the

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TENEROOK  
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act does not apply, and that I have no authority to withhold the deed from the purchaser.

Motion to discharge the order of the 18th *August*, granted.

Motion granted.

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HAZEN *against* THURBER and others.

On a bill for *dower*, the widow was held entitled to the value of the *mesne profits* arising on the use of the undivided third of the premises of which her husband died seized, from the death of her husband, exclusive of the improvements since made thereon. And there being several heirs and terre-tenants, the amount was directed to be assessed upon them respectively, according to the time of their enjoyment of the premises: but as the widow had never claimed her dower, and there was no opposition or vexation on the part of the defendants, *costs* were denied her.

Sept. 9th.

BILL for dower. The question was as to costs and mesne profits. The widow claimed the mesne profits from the death of her husband, who died seized, in 1803, and also costs. There had been no demand of dower of the heir or terre-tenant.

*Butler*, for the plaintiff.

THE CHANCELLOR. The widow is entitled to the value of the *mesne profits* arising from the use of the undivided third part of the premises whereof her husband died seized; and the account is to be taken from his death, exclusive of the improvements since made thereon; and these *mesne profits* are to be assessed upon the defendants, respectively, according to the time of their enjoyment of the land: And there

must be a reference to compute the same. As the plaintiff had never claimed her dower, and no opposition or vexation is chargeable upon the heir or terre-tenant, costs are denied. Lord *Kenyon*, in *Curtis v. Curtis*, (2 Bro. 632.) stated this to be the rule. As the land had been sold to the *United States*, (being at *Rouse's Point*, on *Lake Champlain*, on the *Canadian* line) and the value of the land and improvements paid by the *U. S.*, and the money deposited in Court, for the benefit of whom it might concern, and as the plaintiff has elected to take a gross sum, in lieu of dower, the master is, also, ordered to compute the value of her dower in the sum so assessed, for the land and improvements; and the amount must be paid to her.

1820.

ENSWORTH.  
V.  
LAMBERT.

Order accordingly.

**A. & R. ENSWORTH against LAMBERT, FANNING and others.**

On a bill to foreclose a mortgage, all incumbrancers existing at the commencement of the suit, must be made parties.

Where the objection of a want of parties is made out of season, the plaintiff, instead of amending the original bill, may file a *supplementary* bill, merely to bring in the parties wanting; and the defendants to the original bill need not, in such case, be made parties to the supplemental bill.

**BILL** to foreclose a mortgage. The defendant, *L.*, suffered the bill to be taken *pro confesso*, and the other defendants answered. The defendant, *L.*, had a mortgage on the premises subsequent to the one owned by the plaintiff. The master's report was obtained preparatory to a final decree for the sale of the land; and the defendant, *L.*, came in and stated, by petition, that *George Astor* held a mortgage

Sept. 26th.

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**REEWORTH**  
**v.**  
**LANBERT.**

upon the premises, subsequent, in point of registry, to his; and prayed that the plaintiffs might be ordered to amend their bill and make him a party, so that a good title might be given upon the sale, and all deception upon the purchaser, and all future trouble, be prevented.

*G. W. Strong*, in support of the petition.

*J. C. Spencer*, contra.

THE CHANCELLOR ordered the proceedings to be stayed, and that *G. A.* should be brought into Court, as it was a fixed rule, and essential to justice, that no decree should pass, until all necessary parties were brought in. All incumbrancers existing at the commencement of the suit must be made parties, or else their rights will not be affected by the decree and sale thereon. To save time and expense, a supplemental bill may be filed by the plaintiffs, instead of amending the original bill; and when it is used merely for the purpose of bringing a formal party before the Court, as a defendant, the defendants to the original bill need not be made parties. (*Redesd. Tr. Ch. Pl. 70.*) Where the objection for want of parties is made rather out of season, as in *Jones v. Jones*, (3 *Atk.* 110. 217.) the want of parties may be supplied by a supplemental bill. In that case, the cause had been once heard, and was brought on again upon the equity reserved, when the objection was raised. So, also, in *Holdsworth v. Holdsworth*, (*Dick.* 799.) parties appeared to be wanting on an appeal from a decree at the Rolls, and the cause was ordered to stand over, with liberty for the plaintiffs to file a supplemental bill, merely to add parties.

The proceedings in the cause were, accordingly, ordered to be stayed, and the plaintiffs had leave to file a supplemental bill, in order to bring in *G. Astor*, who held the third incumbrance.

Order accordingly.

1820.

THOMAS  
V.  
STEVENS.

THOMAS against STEVENS and MAXWELL, Executors, &c.

Though the name of a legatee is entirely mistaken by the testator, as *Cornelia Thompson*, for *Caroline Thomas*, yet the bequest is good; and the intention of the testator, and the misnomer, being satisfactorily shown, the legacy was ordered to be paid to the person intended.

REQUEST by will of a bank share to *Cornelia Thompson*. The plaintiff claimed the bequest, on the ground that her name, which was *Caroline Thomas*, had been mistaken by the testatrix, or by the person employed to draw her will, and that the plaintiff was the person intended.

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26th.

The defendants, who were the executors, admitted, by their answer, the material facts charged in the bill; that the testatrix had been dead upwards of two years, and that no person by the name of *Cornelia Thompson* had appeared to claim the legacy, and that they believed and admitted, that the plaintiff was the person intended; for she was a great favourite with the testatrix, and it was understood and believed, that some provision by will was to be made for her. That a great friendship had existed between the testatrix and the mother of the plaintiff, who died some time before the testatrix.

*Goodenow*, for the plaintiff.

*Maxwell*, for the defendants.

THE CHANCELLOR, upon the facts admitted, being perfectly satisfied of the intention of the will, and of the misnomer, on the authority of the cases of *Beaumont v. Fall*, (2 P. Wms. 140.), and *Bradwin v. Harpur*, (Amb. 374.) de-

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ROGERS  
v.  
ROSS.

creed, that the defendants should convey the bank share to the plaintiff.

Decree accordingly.

ROGERS and others, Executors of HENDERSON, *against*  
ROSS, Executrix, &c.

Where the will of the testator is so ambiguously expressed, as to render it proper for the executor to take the direction of the Court; the costs will be ordered to be paid out of the fund in controversy.

November  
26th.

THIS cause came on to be heard upon the equity reserved, upon the coming in of the Master's report, (vide ante, p. 388. S. C.) a question arose, whether the costs of the defendant should be charged upon the assets of her testator, or upon the fund in controversy, being the rents and profits of certain real estate.

*T. A. Emmet*, for the plaintiff, contended, that the costs ought not to fall upon the fund, for that would be making the owners of the fund pay the costs of the defendant in unsuccessfully resisting their demand.

*Wells*, contra, cited *Morrell v. Dickey*, 1 Johns. Ch. Rep. 153.

THE CHANCELLOR. Neither the defendant, nor her testator, were in fault. Her testator was the executor of *Alexander Henderson*, and the will of *A. H.* was expressed so ambiguously, as to the disposition of the intermediate rents and profits of the farm devised to *William Henderson*, that counsel differed as to the true construction and legal operation of the will on that point. It was, therefore, an act of



sound discretion in the executor of *A. H.*, and in the defendant, as his executor, to require the direction of this Court; and the fund in dispute, not his own estate, ought to bear the expense of the suit. This was the principle advanced in the case cited; and it has been frequently held, that costs ought to be charged upon the general assets of a testator, or upon the fund created by his will, if the will be so drawn as to create difficulty, and render a resort to this Court advisable. (3 *P. Wms.* 303. 3 *Bro.* 25. 192.) It is, also, the settled doctrine, that executors, and other trustees who have acted fairly, or who have resisted a claim in good faith, merely by way of submission, shall have their costs out of the fund. (1 *Vesey*, jun. 205. 246.) The costs, therefore, must be paid out of the fund.

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KERSHAW  
V.  
THOMPSON.

Order accordingly.

KERSHAW *against* THOMPSON and others.

The power of the Court to apply the remedy in the case, is co-extensive with its jurisdiction over the subject matter.

Thus, when a foreclosure of the equity of redemption and sale of mortgaged premises is decreed, and the mortgagor or defendant, or any person who has come into possession under him, pending the suit, refuses to deliver up the possession, on demand, to the purchaser under the decree, the Court, on motion for that purpose, will order the possession to be delivered to the purchaser, and not drive him to an action of ejectment at law; though the delivery of possession is not made a part of the decree.

In case of disobedience to such order, an *injunction* issues, of course, on affidavit of service of the order, &c. to enjoin the defendant to deliver possession: And on proof of service of the injunction, and a refusal of the party to comply, a *writ of assistance* is issued, of course, to the sheriff.

1826.

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**KIRKMAN**  
 v.  
**THOMPSON.**

Oct. 22d. and  
 Nov. 20th.

Where the delivery of possession is made a part of the decree of foreclosure and sale, a writ of execution of the decree is the proper remedy, in case of disobedience.

THE petition of *Jacob Berry*, one of the defendants, stated, that on the 10th of *August* last, he became a purchaser of the premises mentioned in the pleadings in this cause, which were sold under a decree of this Court. That on the 12th of *August*, the master executed a deed to him, for the consideration of eight thousand three hundred and fifty dollars, being the price at which the premises were struck off, and deemed to be their full value. That within ten days after the conveyance, he applied to the defendant, *Elizabeth Thompson*, who was and is in possession of the premises, and requested a delivery of the possession to him; but she refused to give possession, unless he would pay her five hundred dollars. That he again applied to her on the 17th of *October*, shewed the deed from the master, and demanded possession, and, at the same time, gave her notice that he should apply to this Court on the 21st of *October*, for an order on her to deliver up the possession, and to pay him a reasonable compensation for the use of the premises from the 10th of *August*, with the costs of the application. That her husband, *Justus Thompson*, defendant, is now, and has been, for several years past, absent from the state. The petitioner prayed for an order pursuant to the notice so given to Mrs. T.

It appeared from the original bill, that the premises, consisting of a house and twenty-five acres of land, and three acres of salt meadow, lying in *Bushwick, Kings County*, were sold in 1804, by the plaintiff, to *Justus Thompson*, the defendant, who, pursuant to an agreement, executed a lease to the plaintiff of twelve acres and an half, for life, free of rent, and on the 6th of *May*, 1805, executed a bond and a mortgage of the whole, to the plaintiff, to secure two thousand dollars, part of the consideration money. The mort-

gage, in which Mrs. T. joined, was duly registered. The other defendants were subsequent judgment creditors and mortgagees. The bill charged that the bond was unpaid, and the mortgage forfeited, whereby the estate became absolute at law; and that the plaintiff had called on the defendant, T., to pay the debt, or to deliver up the possession of the premises to the plaintiff, and release the equity of redemption. The bill prayed for a decree, that T. should pay, or be foreclosed of all equity of redemption, and surrender up all the title deeds, or that the premises be sold, and for general relief. The bill was taken *pro confesso*, against J. Thompson and his wife. On the coming in of the master's report, stating a balance of 3,486 dollars, and 33 cents due to the mortgagee; it was decreed, on the 15th of June last, that the right of the defendants, T. and wife, in the mortgaged premises, subject to the life estate of the plaintiff, in the northerly half of the farm, be sold, &c. and that the master execute a deed to the purchaser, &c.

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KESSEAW  
V.  
THOMPSON.

C. Baldwin, for the petitioner, now moved for an order on the defendant, Elizabeth T., in pursuance of the notice stated in the petition. He cited *Dick. Rep.* 617. 1 Bro. 376. 1 Fonbl. Equ. 31, note.

Sampson, contra. He cited 2 Ch. Cas. 244. 2 Madd. Pr. 360, 361. 4 Inst. 79. 1 Roll. Abr. 373. Wyatt Pr. Ry. 157. 205. 1 Ch. Cases, 91. 184. 1 Atk. 544. 3 Atk. 275. Barton's Suit in Equ. 210. 213. Hind's Pr. 609. 1 P. Wms. 746.

THE CHANCELLOR. This is an application, on the part of the defendant Berry, as a purchaser of the mortgaged premises, for an order upon the defendant Elizabeth Thompson, to deliver up the possession. She is the wife of J. Thompson, the mortgagor, and united with him in the mortgage; and she was with her husband made a party to the bill, which was filed by the plaintiff as mortgagee, to foreclose

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the equity of redemption. She and her husband suffered the bill to be taken *pro confesso*. The bill stated that she, as well as her husband, duly executed and acknowledged the mortgage; that the debt had not been paid, by reason whereof the estate had become absolute in the plaintiff; that he had applied to the mortgagor to redeem or else to deliver up possession and release the equity of redemption; and the prayer in the bill was, that the mortgagor redeem, or be foreclosed of all equity of redemption, and that he be decreed to surrender up the title deeds, or that the land be sold; and the bill concluded, as usual, with a prayer for general relief.

The decree was, that the right of *Thompson* and his wife be sold by a master, and that he execute a deed to the purchaser, and bring the purchase money into Court. The petition states, that *Berry*, the purchaser, gave the full value of the land, and that he showed the master's deed to the defendant, *Elizabeth Thompson*, and requested a delivery of the possession, which she refused to give, unless he would pay her 500 dollars. She has had due notice of this application, and it is resisted by her, not on the ground of any alleged title or claim on her part to the land, (for none is stated,) but on the ground that the Court has no authority to interfere with the possession, and that the purchaser under the decree ought to be driven to his ejectment at law.

I have examined this point with a disposition not to enlarge the established jurisdiction of the Court, but with an anxiety, at the same time, to afford to the suitor the adequate and perfect relief to which he may be justly entitled. It does not appear to consist with sound principle, that the Court which has exclusive authority to foreclose the equity of redemption of a mortgagor, and can call all the parties in interest before it, and decree a sale of the mortgaged premises, should not be able even to put the purchaser into possession against one of the very parties to the

suit, and who is bound by the decree. When the Court has obtained lawful jurisdiction of a case, and has investigated and decided upon its merits, it is not sufficient for the ends of justice, merely to declare the right, without affording the remedy. If it was to be understood, that after a decree and sale of mortgaged premises, the mortgagor or other party to the suit, or, perhaps, those who have been let into the possession, by the mortgagor, *pendente lite*, could withhold the possession in defiance of the authority of this Court, and compel the purchaser to resort to a Court of law, I apprehend that the delay, and expense, and inconvenience of such a course of proceeding, would greatly impair the value and diminish the results of sales under a decree. A better doctrine was laid down by Lord Hardwicke, in *Yates v. Hambly*, (2 Atk. 360.) when he held, on a bill to redeem a mortgage, that the plaintiff was entitled to redeem upon paying the principal, interest, and costs; that he was not obliged to bring an ejectment for the possession, but he should have a decree for it in Equity, after the mortgage was satisfied, and that it was like many other cases in that Court, where, though the party had a double remedy, he should not be put to the expense.

The distribution of power among the Courts would be injudicious, and the administration of justice exceedingly defective, and chargeable with much useless delay and expense, if it were necessary to resort, in the first instance, to a Court of equity, and, afterwards, to a Court of law, to obtain a perfect foreclosure of a mortgage. It seems to be absurd to require the assistance of two distinct and separate jurisdictions for one and the same remedy, viz: the foreclosure and possession of the forfeited pledge. But this does not, upon due examination, appear to be the case; and it may be safely laid down as a general rule, that the power to apply the remedy is coextensive with the jurisdiction over the subject matter. A bill to foreclose the equity of redemption is a suit concerning the realty, and *in rem*; and the power

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A bill to foreclose the equity of redemption of a mortgage is a suit in rem, and possession follows the decree and will be enforced by the Court.

that can dispose of the fee, must control the possession. The parties to the suit are bound by the decree; their interests and rights are concluded by it; and it would be very unfit and unreasonable, that the defendant, whose right and title has been passed upon and foreclosed by the decree, should be able to retain the possession, in despite of the Court. This is not the doctrine of the cases, nor the policy of the law.

The case of *Dove v. Dove*, (*Dickens*, 617. 1 *Bro.* 375. 1 *Cox*, 101. *S. C.*) which was before Lord *Loughborough*, and also before the Lords Commissioners, in 1783 and 1784, has settled the question as to the authority and practice of the Court.

By the decree, the estate of the testator was to be sold, and all parties were directed to join. There was nothing in the decree that the defendant, or any other person, was to deliver up possession. The tenant in possession, (and who was a party in the cause,) was a widow, and was not in under the will, but under some supposed right of her own, of jointure and dower. The estate was sold, and the purchaser required the widow to deliver him possession, but she refused. He then applied to the Court, and pursued the regular course to obtain the possession, and did obtain it by a writ of assistance. It was shown, by divers precedents, in that case, that the course of proceeding, was first to procure a decree or order (called in that case the common order,) on the defendant to deliver possession, which order is served on the defendant, accompanied with a demand of the possession; and there is sometimes a formal writ of execution of the order to deliver possession. An attachment then issues for disobeying this order, but that attachment, it seems, is only matter of form, and is not to be served. The next act is, an order for an injunction against the tenant to deliver possession, which issues of course, on affidavit of the previous steps, and then, on affidavit of

the service of injunction, and refusal, a writ of assistance to the sheriff to put the party in possession, issues, of course, on motion, without notice.

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This is a case very much in point. It applies to the one before me, in every essential particular; and I cannot see why it ought not to be regarded as a just and conclusive authority on this question of jurisdiction and practice.

The forms of process mentioned in that case, are all to be found in the older books of practice; and the same course of proceeding in decrees concerning land, is declared and laid down both in the old and the modern books. (*Bohun's Our. Cancell.* 368. 374. *Newland's Pr.* 198. Lord Hardwicke, in *Stribley v. Hawkie*, 3 Atk. 275. *Huguenin v. Baseley*, 15 Vesey, 180.) Lord Hardwicke says, in *Penn v. Lord Baltimore*, (1 Vesey, 444.) that Chancery will enforce a decree in rem, as to lands lying within its jurisdiction, and that it was settled as early as the time of James I., that it would put a party into possession in a suit concerning lands. He had previously asserted the same jurisdiction, in *Robertson v. Rays*. (1 Atk. 543.)

In the compilation made by West, in the reign of Elizabeth, (*West's Symbol.* part 2. 189.) it is stated, that if the decree be in a suit for lands, and the defendant detain the possession, against the process of contempt, a commission goes to the sheriff to put the plaintiff in possession; and he gives us the form of the writ. The same course of proceeding under a decree for the possession of land, is prescribed by Lord Bacon, in his rule No. 9.

There could be no doubt, under any of the cases, that this usual course to obtain delivery of possession, would be admitted, if it was made part of the decree, that the possession was to be delivered. That omission constitutes all the difficulty of the case. But the possession, as a consequence, is necessarily implied in a decree directing the sale of land, and a deed to the purchaser. The sale would be useless, and without meaning to the purchaser, if it was not to be accompanied

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with actual possession. When the declared object of the bill is to foreclose the mortgagor's equity of redemption, and to obtain possession, or else to have the land sold to satisfy the debt, and the decree directs a sale in pursuance of the prayer of the bill, the rights of the mortgagor are necessarily concluded, and possession is part of the title, and equally within the meaning of the suit, and the spirit of the decree. A bill of foreclosure is for a specific performance of the mortgage contract, by passing the whole title of the mortgagor to the plaintiff, or to the purchaser under the decree, and it is peculiarly a suit *in rem*. The whole object of the suit is the remedy, by foreclosure, or sale of the mortgaged premises; and it is, therefore, within the reason of the cases which speak of a suit concerning the title and possession of the land itself. In the case of *Dove v. Dove*, already cited, there was a decree for the sale of the land, but there was no special direction in the decree for the delivery of possession to the purchaser; yet the remedy for the possession seemed to be granted as a matter of course. The doubts and deliberation in that case, rested only upon the point of regularity as to the process.

The anonymous case in 2 *Ch. Cas.* 244. was relied on by the counsel, in opposition to the motion; but it does not weaken, essentially, the doctrine which I have deduced from the other cases; and it is, besides, so briefly, and so very loosely reported, as to be scarcely deserving of any consideration.

That was the case of a mortgagee suing to have his money, or that the equity of redemption be foreclosed. Without giving us the substance or nature of the decree, the case then adds, that by "subsequent orders," possession was ordered to the mortgagee, and the heir was prosecuted for a contempt in not delivering possession; and, on examination, "he set forth a title." Lord Chancellor *Nottingham* would not discuss the title, and agreed to leave the plaintiff to such



title as he had, without amending it, and the heir was discharged from the contempt.

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This case shows, that the delivery of possession was no part of the decree, but of subsequent orders, yet no objection was made on that ground, and which, indeed, is the only colourable ground of objection in the present case. It does not appear that the heir was a party to the suit and decree, and the contrary is to be presumed, since he, afterwards, set up a title, and that was the real objection to the proceeding. To add possession to the plaintiff's claim, would be amending it, or strengthening it, against the title set up by the heir, and it was very probable, even from the imperfect note of that case, that it was an act of sound discretion to leave the party to try his title by suit against the heir. That case has no analogy to this, for here is one of the mortgagors, and a party defendant to the suit, and one who suffered the bill to be taken *pro confesso*; endeavouring to extort a large sum from the purchaser, as the price of the possession, when she sets up no claim, and is justly concluded by the decree. It is so very reasonable, that the party against whom a decree has been rendered, and under which his property has been sold, should surrender up the possession to the purchaser under the authority of the decree, without the delay and expense of a new suit, that *Buller, J.* was inclined to think, in *Taylor v. Cole*, (3 Term Rep. 208.) that the sheriff, even on a *fi. fa.*, might turn the debtor himself out of possession, in favour of the purchaser of the farm; and *Mr. J. Livingston*, (1 Johns. Rep. 44.) in a case in our Supreme Court, intimated the same opinion.

As to the mode of proceeding in the present case, it is proper to grant an order on *Elizabeth Thompson*, the defendant in possession, to deliver the possession of the premises to *Berry*, the purchaser, according to the intent and meaning of the decree directing a sale. If it had been specially expressed in the decree itself, on directing that the

Form of proceeding to obtain possession of mortgaged premises under a decree.

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Master should execute a deed to the purchaser, *that the defendants who may be in possession, or any person who has come in under them, or either of them, pendente lite, deliver possession of the mortgaged premises to such purchaser, on production of the deed*, then a formal writ of execution of the decretal order to deliver possession, would have been proper. But as this effect and intention of the decree, though necessarily resulting from it, and clearly implied, is left to inference, as it was in the case of *Dove v. Dove*, the order to deliver, and a service of it, must supply the place of the more formal process. The attachment on the disobedience to the order is a useless process, since it is not to be served, and it clearly may be dispensed with. The course of proceeding, in this case, is the order, then the injunction, and then the writ of assistance.

It was, thereupon, "ordered, that the said *Elizabeth Thompson*, one of the defendants in this cause, on being served with a certified copy of this order, forthwith deliver up to the said *Jacob Berry*, the mortgaged premises mentioned and described in the pleadings and decree in this cause, and in the deed executed by the Master to the said *Jacob Berry*, in pursuance of the said decree; and upon such service, accompanied with a demand of the said possession, and a refusal thereof, the said *Jacob Berry* may apply for an injunction according to the course of the Court in such cases."

1890.  
THOMPSON  
V.  
BROWN.

THOMPSON and others against BROWN, FAY, and others.

The Court of Chancery may appoint a person to carry on trade, for an infant partner.

Where an administrator of a deceased partner, without applying to this Court for its direction, *bona fide*, permitted the surviving partner to sell the joint stock, in the usual course of the trade, for the joint benefit of himself and the intestate's estate, he was held not to be responsible to the creditors for any loss; but he is *personally* liable for any debts contracted by such assumed partner.

So, if he puts into the hands of the surviving partner, *assets* which he had in his own hands, and under his own control, to trade with, he will be answerable for the loss.

Executors and administrators, or trustees, acting with good faith, and without any wilful default or fraud, will not be responsible for the loss which may arise.

A creditor may come into a Court of Chancery against an executor or administrator, for a discovery and distribution of assets.

Upon the usual decree to account, in a suit by one or more creditors against an executor or administrator, either separately for themselves, or specially, on behalf of themselves and all other creditors, the decree is for the benefit of all the creditors, and in the nature of a judgment for all; and all the creditors are entitled, and should have notice for that purpose, to come in and prove their debts before the master, and they are to be paid by the executor or administrator; rateably, after judgment creditors are satisfied, without preference or regard to the legal priority of specialty over simple contract creditors. And from the date of such decree, and on a due disclosure of assets, an injunction will be granted, on the motion of either party, to stay all proceedings of any of the creditors at law.

Creditors may file a bill against heirs and devisees for an account for the sale and distribution of the real estate descended, to make good any deficiency of the personal assets. But the real estate will not be directed to be sold, until the amount of the debts, and the deficiency of the personal estate, have been first ascertained.

And it is no objection to a sale of the real estate, for the payment of debts, that the heirs are infants.

A widow and administratrix, who under her claim of dower, and as guardian to her infant children, had received the rents and profits of the real estate, and applied them to the necessary maintenance of

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the children, prior to due notice and application of creditors, was not held to account for the rents and profits so received and expended.

IN 1815, and long time before, *Lemuel Brown* and *Jedediah Fay* were partners in trade, at *Owego*, in *Broome* county, and became indebted to *Kellogg & Sprague*, merchants, in *New-York*. *Brown* died on the 1st of *December*, 1815, intestate, leaving *Elizabeth B.* defendant, his widow, and nine of the defendants, his children. On the 1st *January*, 1816, administration of his estate was granted to his widow, and to the defendants, *J. McQuigg* and *A. Brown*. A judgment was, afterwards, recovered in the *Supreme Court*, by *K. & S.* against *Fay*, as surviving partner of *B. & F.*, for 1,945 dollars and 81 cents. In *May*, 1817, a *test. fi. fa.* was issued to the sheriff of *Broome*, which was returned *nulla bona*. In *July*, 1817, the judgment was assigned to the plaintiffs. The bill stated, that *L. B.* died seised of considerable real and personal estate; that as partner with *Fay*, he owned a moiety of a store of goods, amounting to 7,000 dollars; and that his administrators took possession of the undivided moiety, and by agreement with *Fay*, the administrators engaged to save him harmless against all the debts, as surviving partner, and to sell the goods on joint account. That the administrators sold the goods to persons unable to pay for them, and wasted them. That they received the rents and profits of the real estate, and took possession of the personal estate, and more than sufficient to pay the judgment debt to the plaintiffs. The bill prayed that the administrators of *B.* might admit assets sufficient to satisfy the plaintiffs, or set forth a true account of the personal estate of *B.*, and what part had come to their hands, and how they had disposed of the same, and make discovery of the facts relative to their connection with *Fay*; and, also, an account of the real estate of *B.*, where situated, &c. and the rents and profits which have

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been received, and the claims, if any, on the real and personal estate; and that if the personal estate be not sufficient to satisfy the debt of the plaintiff, the real estate might be sold, and all proper parties join in such sale, and so much of the proceeds thereof, as may be necessary, be applied to satisfy the debt of the plaintiffs, and for general relief.

The *answer* of the administrators of *B.* set forth a full account of the estate, real and personal, of the intestate, &c. and of the disposition of the assets which had come to their hands, and of the debts still due and unpaid. They stated the goods or stock in trade belonging to *B.* and *F.*, according to the inventory taken, amounting to 7,202 dollars and 97 cents, and the undivided moiety of which belonged to *B.*'s estate. They denied that they took possession thereof; but that, conceiving it would be most for the interest of all concerned, they suffered the goods to remain with *F.*, who had during the life time of *B.* the principal direction and management of the partnership concerns; and, at his instance, on the 25th December, 1815, agreed, that he should keep possession of the stores and goods, and sell the goods for the joint benefit of himself and of the estate of *B.*; and they, accordingly, entered into articles of copartnership with *F.* on the same terms as *B.* and *F.* had before carried on the business, and by which *F.* was to continue it, under the firm of *Fay & Co.*, until the partnership should be mutually dissolved. That they entered into this co-partnership with *F.* solely for the benefit of the estate of *B.*, without any intention or desire to benefit themselves, and upon the advice of counsel that they might safely do so. They denied that they had agreed to indemnify *F.*, or entered into any other agreement with him, than the one above mentioned. That *F.* continued to carry on the business, and had the sole and entire management of it. That he sold the principal part of the goods to persons who failed to pay, and converted the residue to his own use, and had never accounted to them, the administrators of *B.*, for any part thereof, and that *F.* was

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insolvent. That the goods remaining with *F.* were seized under a *f. fa.* against him, and his interest therein sold, and the residue so seized, not exceeding in value 491 dollars, were taken possession of by the defendants. That they collected some debts due to *F. & Co.* to the amount of 268 dollars, which was all they had received; that they laid out 411 dollars 51 cents of assets, for the purchase of goods, soon after the death of *B.* and also advanced, in stock, 254 dollars and 25 cents, and this stock and goods was added to the stock in trade entrusted to *F.*, and was included with the rest, and disposed of as above mentioned. They stated various debts due by *F. & Co.* which had been put in suit, amounting to 1,583 dollars 75 cents, and a bond given by *B.* in his life time to *McQuigg*, (defendant,) secured by a mortgage, amounting, principal and interest, to 2,033 dollars. That *Elizabeth B.* was entitled to dower, and as guardian to her children took possession of the real estate, and received the rents and profits, which she had faithfully applied towards the support and education of the children, though these were wholly insufficient, the annual amount not exceeding 125 dollars. That deducting the debts of *B.* paid by them, and the sums advanced by them for stock, there remained in hand only 296 dollars and 91 cents, which, with the goods of *F. & Co.* on hand, and the personal property of *B.* unsold, would not be sufficient to pay more than one third of the amount of the debts due by *F. & Co.* and *McQuigg's* bond; and they believed the whole real and personal estate of *B.* was not sufficient to pay those debts. The bill was taken *pro confesso* against *Fay*. The infant heirs admitted nothing; but prayed the protection and direction of the Court.

The cause was heard on the pleadings and proofs.

*E. W. King*, for the plaintiffs.

*J. A. Collier*, for the defendants.

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For the plaintiffs, it was contended: 1. That the real estate of *Brown* was liable, and ought to be sold for the payment of the plaintiffs. 2. That the personal estate of *B.*, and a moiety of the stock in trade of *B.* and *F.* at his death, are to be deemed, under the facts and circumstances disclosed, as personal assets in the hands of the administrators of *B.* (*Toller's law of Executors*, 155.) 3. That the trade carried on by the administrators in company with *F.* was to be deemed to have been carried on for their individual benefit, and that they were chargeable with interest on the value of the assets, so put in trade. (1 *Term Rep.* 285.) 4. That the administrators were liable for the costs.

For the defendants, it was contended: 1. That the administrators ought not to be held accountable for the moiety of the stock in trade of *B.* and *F.*, left in the hands of *F.*, to be sold for the benefit of *B.'s* estate. In regard to executors and administrators, as trustees, acting for the benefit of others, Courts are extremely liberal. (*Ambler*, 219. 5 *Vesey*, 848. 1 *Madd. Ch.* 114.) They will endeavour to relieve them from any mischief, which may arise from the misapplication of the trust money. (3 *Atk.* 44 4. Though an executor or trustee may be liable for negligence, it must, as Lord Keeper *North* observes, be very sapine negligence. (1 *Vernon*, 144.) It must be *crassa negligentia*, or gross negligence. (1 *Madd. Rep.* 290.) To make out the charge of gross negligence, it must show, since fraud or covin is not and cannot be pretended in this case, that the administrators have acted, or omitted to act, against their knowledge, information, or reasonable expectation; or have taken steps, in reference to the estate of the intestate, extraordinary, unusual, and contrary to the usage of persons in the same situation, and without legal advice. (*Ambler*, 219. 4 *Ves.* 369. 2 *Madd. Ch.* 119. 128.) Nothing of this sort appears in the present case. A Court of Chancery will, sometimes, permit an executor or administrator to continue the

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trade, and carry it on under the advice of the Court, so as to protect him, in case of loss, even at law. Will not this Court consider that as properly done, which, on application for that purpose, it would have authorised the administrators to do? (4 *Vesey*, 389. 1 *Bro. C. C.* 389. 3 *Bro.* 60. 401. 7 *Vesey*, 150.) If, then, these administrators have acted *bona fide*, without claiming the previous permission of the Court, though in a trial *at law*, it may not afford them excuse, yet, when creditors have come into this Court for relief against them, will the Court interfere? There was no new trading; it was merely permitting the surviving partner to do, what he could have done without the consent of the administrators; to dispose of the stock in trade by a sale in the market, in the usual course of the trade, so as to close the concern in a manner supposed the most advantageous for him, and the estate of the intestate. This is not like the case of *Rogers v. Coleman*, (2 *Atk.* 439, 440. *Ambl.* 584. 2 *Atk.* 603.) nor the case of *Barker v. Parker*, (1 *Term Rep.* 287. 295.) which has been cited. That was the case of a *sole trader*; there was, therefore, no rights of a surviving partner, or any obstacle to closing the business immediately. *Fay*, the surviving partner, was the most proper person to close the concern. He was not a *stranger*, but a partner in whom the intestate had reposed unbounded confidence. (3 *Vesey*, 365.) If the administrator had sold the goods, *bona fide*, on a credit, they would not have been liable, if the purchaser had become insolvent. (4 *Dennis v. S. C. Equ. Rep.* 207.) They ought not, then, to be made liable, in this case, for entrusting the property to the management of a person who had been selected by the intestate himself for a similar trust, and who was not known, or suspected, at the time, to be insolvent, or in danger of insolvency. (3 *Atk.* 480.) The case of *King v. King*, (3 *Johns. Cases*, 525.) can have no application to the present case. The administrators not only acted *bona fide*, but they took the advice of counsel; and it has been



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said, that if an executor takes the advice of a *lawyer* in what he does, he will not be chargeable for misconduct. (2 *Madd. Ch.* 128. 5 *Vesey*, 144.) And it is not merely where trustees act themselves, but, also, where they act by other hands, from necessity, or conformable to the common usage of mankind, that they are not answerable for losses. (2 *Madd. Ch.* 119. *Ambl.* 219. 3 *Aik.* 480. *Dickens*, 120. 3 *Vesey*, 565.) Nor is a trustee liable for having applied trust property to what has turned out a losing adventure, if done without fraud or negligence. (1 *Vesey*, *Jun.* 41. 2 *Madd. Ch.* 125. 3 *Bro.* 73. 2 *Bro.* 439. 1 *P. Wms.* 146. 2 *Vesey*, 83. 85. 240.) The case of *Wightman v. Townroe*, (1 *Maule & Selwyn*, 412.) turned on a different point from the one in the present case. 2. But should the administrators be liable, they are not chargeable with *interest*. (2 *Aik.* 439, 440. 603. *Ambl.* 584. 11 *Vesey*, 581. 1 *Vesey*, *Jun.* 294. 2 *Madd. Ch.* 115. 13 *Vesey*, 402.) 3. Nor ought they to be charged with *costs*, for they have not been guilty of any breach of trust, nor of fraud, or gross negligence; (13 *Ves.* 403.) and costs are always in the discretion of the Court. (1 *Johns. Ch. Rep.* 478.)

THE CHANCELLOR. The plaintiffs sue as assignees of *Kellogg & Sprague*, who were simple contract creditors of *Brown & Fay*. After the death of *Brown*, a judgment was obtained at the suit of *K. & S.* against *F.* as surviving partner, and an execution was issued against his property, and returned *nulla bona*. *F.* is admitted to be insolvent, and the bill is against the administrators and infant heirs of *Brown*; it calls upon the former to discover and account for the personal estate, and of *Brown's* share of the stock in trade belonging to the firm of *B. & F.*, and what agreement and dispositions in respect to it, were made with *F.* the survivor. If the personal estate should prove insufficient, the bill seeks a discovery and sale of the real estate of *B.*, and an account of the rents and profits.

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The infant heirs of *B.* admit nothing, and submit themselves to the protection of the Court. But the administrators make a full and frank disclosure of the real and personal estate, and the manner in which they have disposed of the latter, and they state an account of the debts still due and unpaid. By this answer it appears, that the jointstock in trade of *B. & F.*, at the death of *B.*, amounted in value to 7,202 dollars and 97 cents, and of which *B.*'s undivided moiety was 3,601 dollars and 45 cents. They state that they did not take this undivided share into their possession, but suffered *F.* to retain possession, and to go on and sell the joint stock according to the usual course of the trade for the joint benefit of *F.*, and of the estate of *B.* They aver, that they did this without any intention or wish of personal benefit, and upon the advice of counsel; and because they deemed it a safe step, and best for the estate of *B.*, and the interest of the infants, and particularly as *F.* possessed, during the life time of *B.*, his confidence, and had been entrusted by him with the principal care and direction of the partnership concern. The administrators set forth the articles of agreement which they, in their representative character, entered into with *F.*, for the continuation of the partnership for the purposes aforesaid, and for none other. They admit, that *F.*, under that agreement, continued the business by selling the goods for the benefit of himself, and of the defendants, as administrators, and that he had the entire management of the store, and sold on credit to persons who did not pay, and that the proceeds have mostly been lost or converted by *F.* to his own use. They state, that he has never accounted to them, and is reputed insolvent, and that they have only received of the remains of the stock in trade to the amount in value of 491 dollars, and of debts so created, to the amount of 268 dollars. They admit further, that they advanced to *F.*, shortly after the death of *B.*, for the use of the store, assets in the shape of cash, and stock, to the amount of 665 dollars and 76

cents. They then give a satisfactory account of the amount and disposition of the residue of the assets, and of the charges thereon, and they, also, exhibit an account of the real estate descended to the heirs of *B.*, and of an incumbrance thereon.

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The only inquiry in the case would seem to be concerning the proper directions to be given to the Master, on the reference to take and state an account; and a principal question is, whether the administrators are to be held personally responsible for the waste and loss of the assets so entrusted to *Fay* to be sold.

This was not a new and distinct original trading with the assets, voluntarily entered into by the administrators. They found a store of goods in possession of a surviving partner, and they had no other alternative, but either to suffer him to go on and sell upon the usual terms, and under a continuation of the confidence bestowed upon him by the intestate, or to divide the goods, and sell the share of *B.* at auction. The latter would have been a perfectly safe course for them, but, probably, most persons, under like circumstances, and with the same anxiety for the interest of all concerned, would have deemed it best that the surviving partner should go on and close the business in the usual course of the trade. It is said, that a Court of equity will sometimes appoint a person to carry on a trade for the benefit of an infant partner; (*Montagu on Partnerships*, 187. and *Sayer v. Bennet*, there cited;) and Lord *Mansfield*, in the case of *Barker v. Parker*, (1 *Term Rep.* 295.) observed, that he remembered many instances of trade being carried on under the direction of the Court of Chancery. But the case of *Wightman v. Townroe*, (1 *Maule & Selw.* 412.) is one in point, in which executors went on imprudently, and under the great risk alluded to by Lord *Mansfield*, as these defendants have done, without any such protection, and continued the share of the property of an infant daughter of the testator, in a trade in which the testator had been a part-

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ner. The executors in that case left the business entirely to the management of the surviving partner, and solely for the benefit of the infant. The only question made in the K. B. was, whether the executors were not personally liable, as partners, for a debt contracted by the survivor, for the use of the new firm, and they were held to be liable. That was a very different question from the one before me, and resting on very different grounds. An executor may be legally bound as a dormant partner for a credit given to the firm, though the partnership be assumed in the disinterested performance of a trust, and yet not be equitably chargeable as a trustee to creditors of the testator, for a loss of the property.

If an administrator of a deceased partner, *bona fide*, permits the surviving partner to sell the stock in the usual course of the trade, for the joint benefit of himself, and the estate of the intestate, they will not be held responsible to creditors for any loss to the estate; but they, thereby, render themselves personally liable for debts contracted by such assumed partner.

The administrators acted in this case in good faith. There is no pretence of *mala fides*. They reposed confidence where the intestate had before reposed it, and acted exclusively for the interest of others. It was, at most, but an error of judgment, and a want of sharp sighted vigilance. And it would have the appearance of great rigour, and be hardly reconcilable with the doctrines of the Court, to make them responsible for the goods so wasted by the surviving partner. They run sufficient hazard in exposing themselves to personal responsibility for debts contracted by their assumed partner, and from which their representative character would not have protected them; and, I conclude, that the mere fact of leaving the undivided portion of the goods in store, and in the possession of the surviving partner, to be sold for joint benefit, is not, of itself, sufficient to charge them with the loss.

This Court has always treated trustees acting in good faith with great tenderness.

In *Knight v. The Earl of Plymouth*, (3 Atk. 480. Dickens, 120.) a receiver had deposited money with a banker of good credit, who afterwards failed, and as he was not chargeable with any wilful default or fraud, he was not held responsible for the loss of it. The observations of

Lord *Hardwicke* are strong and pointed. "Suppose," he observes, "a trustee having in his hands a considerable sum of money, places it out for the benefit of the *cestui que trust*, in the funds which afterwards sink in their value, or on a security at the time apparently good, and which afterwards turns out not to be so, was there ever an instance of the trustees being made to answer for the actual sum so placed out? I answer, no. If there was no *mala fides*, nothing wilful in the conduct of the trustee, the Court will always favour him. For as a trust is an office necessary in the concerns between man and man, and which, if faithfully discharged, is attended with no small degree of trouble and anxiety, it is an act of great kindness in any one to accept of it. To add hazard or risk to that trouble, and to subject a trustee to losses which he could not foresee, would be a manifest hardship, and would be deterring every one from accepting so necessary an office."

The same rule was followed in *Rowth v. Howell*, (3 *Vesey*, 565.) where executors were not held liable for a loss by the insolvency of a banker whom the testator had trusted, and with whom they suffered stock, deposited by the testator, to remain. The principle of this case has a strong bearing upon the point now under consideration. Other cases may be referred to, (*Wilkinson v. Stafford*, 1 *Vesey*, Jun. 41. *Vez v. Emery*, 5 *Vesey*, 144.) in which the Court of Chancery declared a determination to relieve trustees acting upon professional advice, or with the best judgment they could form, from losses of the trust property.

The case of the assets in hand, which the administrators delivered over to *Fay* to be employed in trade on their joint concern, stands on quite a different footing. Though an administrator may be excused from loss when he leaves an undivided stock of goods in the possession of the surviving partner to be sold, as it is only suffering a business begun by the intestate, to be carried on, according to his intention, to a beneficial conclusion, yet, to put assets, which

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Trustees, acting with good faith, are treated with liberality and indulgence. And if there is no wilful misconduct or fraud on the part of an executor or trustee, he will not be held responsible for a loss, especially where he acts with the advice of counsel.

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But if an administrator of a deceased partner, puts assets which are in his hands, and under his control, into the hands of the surviving partner to trade with, without security, he will be answerable for the loss.

are under the trustees separate control, and which have no connection with any previous partnership, into the hands of a merchant in trade, without any security, is exposing the trust fund to unreasonable jeopardy. The policy of law will not permit a trustee to deal in that loose way with the fund. It becomes a distinct appropriation of his own, and not, as in the other case, a mere acquiescence in the act of the intestate, and a continuation of ancestral confidence.

I conclude, then, that in taking the account, in this case, of the assets, the administrators ought not to be charged with the loss sustained on the moiety of the goods left in the possession of *Fay*, and that they ought to be charged with the 665 dollars and 76 cents, put in trade by themselves.

It appears from the answer and the schedules annexed to it, that the defendants are chargeable with assets to 3,428 dollars and 3 cents, and that they have duly administered of the same to 2,465 dollars and 96 cents, which leaves a balance to be accounted for of 962 dollars and 7 cents. And if to this balance we add 491 dollars, for the residue of the goods in store, delivered to them by the sheriff, and 500 dollars for the value of personal property on hand unsold, the balance to be accounted for will be enlarged to 1,953 dollars and 7 cents.

To meet this balance, they will not be entitled to any credit for the 665 dollars and 76 cents, advanced to *Fay* and lost; but they will be entitled to a credit thereon for debts of the copartnership of *B.* and *F.*, assumed by them prior to this suit, and mentioned in their answer, and estimated therein as amounting to 1,583 dollars and 75 cents. If these sums should prove to be correct, they would then have a balance in hand of only 369 dollars and 32 cents, to answer the demand of the plaintiffs, and the bond of *McQuigg* which is mentioned in the answer.

But a difficulty arises as to the proper direction to the master, in respect to the debts. The answer states, that there is a bond creditor, whose debt would greatly exceed the

**assets.** Shall the master be confined to what is due to the plaintiff, or shall he also take an account of the bond debt of *McQuigg*, and of the debts of all the other creditors of the intestate? The *English* practice seems now to be to direct the master "to take an account of what was due to the plaintiff, and to all other the creditors of the testator or intestate, and that the master cause an advertisement to be published in the *London Gazette*, and such other public papers, as he may think proper, for the creditors to come in before him and prove their debts; and that those who should not come in and prove their debts by a peremptory time to be by him fixed, were to be excluded from the benefit of the decree, and that those persons, not parties to the suit, who should come in before the master to prove their debts, were, before they should be admitted creditors, to contribute to the plaintiff their proportion of the expense of the suit, to be settled by the master," &c. There are very important consequences growing out of the form of the decree, and which may subsequently affect the rights of other creditors at law, and the whole course of administration of the assets. A creditor has a right to come here for a discovery of assets. This is a settled and necessary right. When here, said Lord Hardwicke, (2 *Atk.* 363. 3 *Atk.* 263.) he shall not be turned over to a suit at law, and put to that expense. He shall be decreed satisfaction here for his debt, and this, upon the ground of preventing multiplicity of suits. But then to protect the executor or administrator in making that satisfaction, the decree must be maintained as equal to a judgment at law; and this leads to much interference with the proceedings of creditors at law, and threatens to draw all the creditors, and the entire distribution of assets, into this court. I have had occasion heretofore (3 *Johns. Ch. Rep.* 58, 59.) to express my apprehensions of this result; and, therefore, to attain all the information that may be wanting on the subject, I have looked into the history and principles of the English practice.

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In *Joseph v. Mott*, (*Prec. in Ch.* 79.) a bond creditor brought a bill against an executor to have a discovery and account of the personal estate of the testator, and a satisfaction of his debt. There was a decree by default against the executor, for an account and satisfaction out of the assets. Before the decree was made absolute, another bond creditor sued the executor at law. The latter appeared, but suffered judgment, as the decree could not be pleaded at law, and the question before the master was, whether he should allow that judgment which the executor had brought in; and the Master of the Rolls, afterwards the Lord Chancellor, held that the decree must be preferred.

This case was decided as early as 1697, by Lord Somers; and as the decree was prior, in point of time, to the judgment, and assuming it to have been entitled to the character of a final decree, the decision was undoubtedly correct, and it is now the undisputed doctrine of the Court.

The next case to be noticed is *Darston v. The Earl of Orford*, in 1701. (*Prec. in Ch.* 188. 3 P. Wms. 401. Note F., S. C.) A bond creditor filed his bill for discovery of assets and to be paid, and pending the suit, after answer, and before decree, the executor voluntarily, and without suit, paid another bond creditor. An account was afterwards decreed, and the question was, whether the executor should be allowed that payment, in the account to be taken. The Lord Keeper held, that the payment was not to be allowed, it being pending a suit here, which was equivalent to an action at law. But this decree was afterwards reversed, on appeal, and the voluntary payment allowed. (*Colles' Cases in Parliament*, 229.) The doctrine then stood, that pending a suit in chancery, and before decree, a voluntary payment by the executor to another creditor in equal degree, would be good. This case did not seem necessarily to overthrow the case of *Joseph v. Mott*, though Lord Keeper Wright thought so, for the point there was, whether a decree prior in time to a judgment, should not be



preferred; and Lord *Talbot* cited the case of *Joseph v. Mott* as a good authority to that point.

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The ultimate decision on appeal in *Darston v. Lord Orford*, was not according to sound principle, assuming what is now settled, that Courts of Equity have concurrent jurisdiction with Courts of law in suits against executors, and that a voluntary payment to a creditor, in equal degree, is not good after action brought, though a voluntary confession of *judgment* to another creditor is good, and may be pleaded. In *Waring v. Danvers*, in 1775, (1 *P. Wms.* 295.) it was held, that if a bill be filed by a simple contract creditor, against an executor, and the executor thereupon voluntarily confesses *judgment* at law to another simple contract creditor, that judgment creditor would be preferred.

The jurisdiction of Chancery over the distribution of assets, appears by these cases to have been clearly established in the beginning of the last century, and the only difficulty was to reconcile this jurisdiction with the toleration of a race of diligence by creditors at law. But in the course of time, the rights of parties in the respective Courts, and the course of proceeding in Chancery, became gradually better understood and more accurately defined.

In the case of the creditors of *Sir Charles Cox*, in 1734, (3 *P. Wms.* 341.) *Sir Joseph Jekyll*, the Master of the Rolls, thought it to be a clear point, that if a simple contract creditor, *on behalf of himself and the rest of the creditors*, brought a bill and obtained a decree for him and *the rest of the creditors*, to come in before the master and be paid their debts, and that notice be given in the gazette for that purpose, a bond creditor coming in on the foot of that decree should only be paid *pro rata* with the simple contract creditors, for his coming in *implied a submission to the decree*. He was inclined to hold further, that if such bond creditor, *with notice of the decree and of the advertisement*, should lie by and sue the executor at law, the executor and the simple contract creditor would have an equity to compel him to come in

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and take only his rateable proportion. This was, however, but opinion, and no part of his judgment; and on the decree for an account, (3 P. Wms. note 3. p. 344.) the master was directed to distinguish between the legal and the equitable assets, and that such as were legal should be applied in a course of administration, and such as were equitable, should be applied *pari passu*.

According to this case, then, a creditor who did not choose to come in under the decree, was not obliged to give up his legal preference, as a specialty creditor, over a simple contract creditor, in respect to his claim upon the legal assets.

In *Robinson v. Tonge*, in 1735, (3 P. Wms. 398.) a bill was filed by bond creditors against an administrator, and the usual decree was made, that the defendant account, and that the master be at liberty to state any thing specially. In this case, it was insisted, and agreed to by Lord Talbot, that the administrator could not pay a bond debt, after a bill in equity brought against him by another bond creditor, and notice, as the bill was in nature of an action of law, in which case, the administrator would not be permitted to pay the bond creditor, without giving him a judgment.

This opinion of Lord Talbot was unquestionably sound in principle; yet it was directly against the decree on appeal in *Darston v. Lord Orford*, and may be considered as reinstating the authority of the decree of the Lord Keeper in that case.

The great case of *Morris v. The Bank of England*, in 1736, (*Cases Temp. Talbot*. 218. 4 Bro. P. C. 287. S. C.) established, by the highest authority, that decrees in Chancery were equal to judgments at law, and entitled to the same effect in the distribution of assets. In that case, some of the creditors of *Morris* filed a bill against the executrix, praying for payment. She confessed the bill, and the decree was, that an account of the personal assets be taken, and that those debts be paid in a course of administration.

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The executrix paid part thereof under the decree, and other creditors filed another bill, which was also confessed, and a decree made that the executrix pay what was to be certified by the master to be due, in a course of administration. She was then sued at law by several simple contract creditors, and among others, by the *Bank of England*. All those creditors had notice of the decree, and that the assets were not sufficient to discharge the specialties, and that a considerable part of the moneys due, under the decrees, were unpaid. All the creditors at law, except the bank, took judgment for assets *de futuro*. The bank took issue on the plea of the executrix, and went to trial, and obtained a judgment, subsequent to the other judgments. She then filed her bill against the several creditors by decrees and judgments, stating all the facts, and that she could not, at law, protect herself, under those decrees, from executions on the judgments. Sir Joseph Jekyll, the Master of the Rolls, directed the *decree creditors* to be first paid, as being prior in time, and then the *judgment creditors*, according to priority, and then the other creditors to be paid in a course of administration; and the judgment creditors were enjoined from proceeding at law, for so much of the assets as were covered by the decrees. On appeal to Lord Chancellor Talbot, he affirmed the decree at the Rolls, and specially directed that the master take an account of what was due to all the creditors, and of the assets received; that the assets were then to be applied, in the first place, to pay the creditors under the decrees, according to priority, the residue of the assets to be next applied to pay the several judgments according to their respective priorities, and if any thing should remain, then to pay the other creditors in a course of administration; and the defendants who had obtained judgments at law, or who had not yet obtained any judgment or decree, were enjoined from proceeding at law against the executrix, and all parties were to be paid their costs out of the testator's personal estate.

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The Chancellor observed, in giving his opinion, that Chancery, in the distribution of legal assets, followed the rule of law, which allowed of preference to creditors who had used legal diligence; and that that Court had only a concurrent jurisdiction over **LEGAL** assets with Courts of law; and as such preference was allowed by law, there would be great confusion in the administration of legal assets, if Chancery did not, in general, follow the same rule. If decrees did not stand upon an equal footing with judgments, and to be paid indiscriminately with judgments, according as the one or the other should happen to be prior in time, the Court, as he observed, would have to give up its jurisdiction.

To protect the executor or administrator, in paying a creditor, a decree of this Court is held equivalent to a judgment in a Court of law; and a decree prior in time to a judgment is to be first paid; and judgment creditors may be enjoined from interfering at law with such priority. But creditors will not be restrained from proceeding at law, merely on a bill being filed in this Court, and a judgment obtained before a decree here, will be protected in its priority.

This case then settled the point, that a decree prior in point of time to a judgment was to be first paid; that judgment creditors at law would be enjoined from interfering with this priority, and that when they were brought before the Court of Chancery, the distribution would be made *there* with a due preservation of priorities; and that as to other creditors, they were to be paid in a *course of administration*, and which I understand to mean according to legal priorities. The assets were not altered by such a decree, but remained legal assets to be administered according to the rule of law.

This decree, upon appeal to the House of Lords, was affirmed; but it was discussed with very great ability, and especially by the counsel for the appellants, who dwelt upon the inconvenience of allowing a voluntary decree, submitted to by an executor in favour of some creditor, to be a sufficient ground for drawing all the other creditors and the entire distribution of the assets, into equity; that this would expose the creditors to great delay and expense, as the accounts might be taken and the demands adjusted before any payment, and the whole costs of the litigation might fall upon the fund. It was observed, that bills by executors, in the first instance, to have the assets brought

into equity and distributed as equitable assets, had always been rejected.

The case of *Smith v. Eyles*, in 1742, (2 *Atk.* 385.) brought the subject before Lord *Hardwicke*, who held, that a decree for an account, *quod computet*, did not alter the nature of the demand; and that until a final decree, an executor might confess a judgment which would have priority, because, until then, it would be impossible to pronounce who would be debtor or creditor; and the same doctrine was lately held by Lord *Eldon*, in *Perry v. Phelps*. (10 *Vesey*, 34.) He said that a final decree upon a sum ascertained was equal to a judgment; but that a mere decree for an account of the demand of the creditor and of the assets in the hands of the executor, with a mere direction for payment out of the result of that account, would not prevent the executor from paying a judgment. Until it is ascertained what is due, and a report and an order made thereon to pay, *non transit in rem judicatam*. All the decrees appealed from in *Morris v. The Bank of England*, were decrees ordering payment of sums liquidated by statements in the bill, and the admissions of the answer, and were considered in the House of Lords as final decrees.

The *anonymous* case in 3 *Atk.* 572. is too brief and loose to be of much consequence; but from that case it would appear that any single creditor might file a bill against the executor, without taking notice of other creditors, and the decree would be, that the executor account before a master, and pay, in the course of administration, according to the order of legal preference of the debts, to be by him exhibited to the master. But in *Martin v. Martin*, in 1748, (1 *Vesey* 211.) Lord *Hardwicke* lays down more precisely the practice of the Court in the analagous case of the heir at law. Actions at law were brought by several bond creditors against the heir, and a bill was also filed against the heir, by other bond creditors, on behalf of themselves and the other creditors, to have satisfaction out of the real and per-

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sonal assets. Here was a race of diligence by different sets of creditors in the different concurrent jurisdictions. A decree was obtained in Chancery directing an account of the debts, and a sale of the real assets descended, to satisfy those demands. The heir then filed his bill to restrain those bond creditors who sued at law, because by the decree for a sale, the fund was taken from him. The Lord Chancellor granted the injunction, and held that the heir or executor, in a like case, had no relief but by injunction, to support the decree and prevent a double charge, for though the decree was prior in time, it could not be pleaded at law. The decree or judgement first obtained must be first paid, and if the decree be prior, it could only be established by injunction. But he observed, that *until a decree*, a proceeding by different creditors in different suits, in law and equity, cannot be stopped, or the chance of gaining priority prevented. The constant course of the Court, on a decree for sale in satisfaction of a bond creditor, not only in the case where it was on behalf of himself and others, but even where the bill was *for satisfaction of his own particular debt*, was to direct an account of *all the bond debts of the ancestor, with liberty to the creditors to come in for a satisfaction*. He said, no decree could be made without this liberty, for all the creditors were entitled to receive satisfaction, and might otherwise sue at law and proceed against the estate; which, after the decree for a sale, would be mischievous.

A suit by one creditor against an heir, and a decree for the sale of the assets descended, will enure for the benefit of all the creditors, and draw the entire distribution of them, into this Court.

This case then settles the rule, that in a suit against the heir, and decree for a sale, it enures for the benefit of all the creditors, against the heir, and draws the entire distribution of the assets of the heir into this Court.

The case of *Douglass v. Clay*, in 1767, (cited in 1 *Bro.* 184. and 10 *Vesey*, 40.) was decided by Lord *Camden*, upon the administration of personal assets; he held, that until a decree, any creditor might proceed at law, but after the decree, the Court considered it as much available to any

creditor, and as to all who came in, as if all had obtained judgment. A decree, therefore, at the suit of creditors against an executor, for an account, binds all other creditors, and if they afterwards sue at law, the Court will enjoin them. Lord Thurlow, afterwards, in *Brooks v. Reynolds*, in 1782, (1 Bro. 183.) declared the same rule. That was a bill by trustees against the heir, executor, and legatees; and the decree directed proper accounts to be taken, and the personal estate, not specifically bequeathed, to be applied to pay debts and legacies; and if not sufficient, any creditor was at liberty to apply to the Court. Here was no special order for creditors to come in. Proceedings were had under the decree, but there was no report; and in the mean time there was a suit at law by a creditor. The executor filed a bill to stay that suit, and the Chancellor held that it made no difference though creditors were not ordered to come in, nor the bill filed on behalf of creditors, for they might come in before the Master, and as the Court had taken the fund into its own hands, it would not permit the executor to be sued at law.

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And it is the  
same in suits  
against execu-  
tors and admi-  
nistrators.

These two cases would seem to settle the rule in the case of personal assets, as much as that before Lord Hardwicke did, in the case of the heir; and they consider a decree against an executor, as enuring equally for the benefit of all the creditors, and as drawing the whole administration of the personal assets into this Court.

The case of *Goate v. Fryer*, in 1789, (2 Cox, 201.) is much to the same purpose. A creditor filed a bill on behalf of himself and all the other creditors who should come in and contribute, for an account of the personal estate of the intestate, and a distribution rateably among all the creditors. The administrator submitted to account, and a decree was made for taking an account, advertising the creditors, and for a *rateable distribution*. The administrator was sued at law before filing the bill, and after pleading, and immediately after the decree, filed a bill for an injunction.

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Lord *Thurlow* said, it was now the settled rule of the Court, not to permit any creditor to proceed at law against an executor or administrator, *after a decree to account, and for payment of all debts*, for that gives every creditor who comes in, a claim equal to that of a creditor by judgment at law, from the date of the decree. The Court only supports a decree as equal in point of rank to a judgment, and then follows the rule of law giving preference to the judgment or decree, prior in time. Such a decree was considered as taking the administration of the whole personal estate into the hands of the Court, and that all subsequent proceedings at law were to be stayed. The injunction was granted, but as the suit at law was first commenced, the creditor was allowed to prove his costs also under the decree.

The following case of *Hardcastle v. Chettle*, in 1792, (4 Bro. 163.) was founded upon the same doctrine, and related to the question of staying suits at law. It was the case of a bill by a creditor on behalf of himself and other creditors, against an administrator, for an account, &c. The usual decree was rendered for taking an account, and for creditors to come in before the Master, and the usual notice was inserted in the gazette. A creditor came in before the Master, but did not establish his debt, and afterwards sued at law and obtained a verdict. A motion was made for an injunction to stay the entry of judgment. The Lords Commissioners granted the motion, and held, that as the creditor had appeared before the Master to prove his debt, he had so far become a party to the suit, as to warrant the motion, *without filing a new bill*.

In *Rush v. Higgs*, in 1799, (4 Vesey, 638.) an executor who had been sued at law, and in which suit issue had been joined, filed his bill to stay that suit at law, and prayed for the direction of the Court as to his administration. His counsel endeavoured to support the injunction, contrary to the received doctrine, that it was previously necessary that there should be a decree for an account at the instance of a



creditor, and that the executor cannot come in voluntarily and file a bill against all the creditors. But Lord *Loughborough* said, that there was no instance in which a creditor at law had been stopped, *unless there was a decree under which he could come in*; and he said further, that the executor could not file a bill against all the creditors. This would be to cast off at once upon the Court, the whole burden of his administration.

The subject was brought into discussion before Lord *Eldon*, in *Paxton v. Douglass*, in 1803. (8 *Vesey*, 520.) Here was a decree for an account against an administrator, and a motion was then made on his part, for an injunction, to restrain a creditor at law, and it was considered, on that side, as a motion almost of course. The objection was, that there ought to have been a bill filed against the creditor, to sustain the motion. Lord *Eldon* said, that it was well settled, that a decree for administration of assets, was a decree, in nature of a judgment *for all creditors*; and that since Lord *Hardwicke's* time, the Court had been in the habit of enjoining *any creditor*, for that purpose. The recent practice introduced by Lord *Rosslyn*, had been to grant the injunction *without a new bill*, on the convenient ground, that the creditor might come in before the Master upon the foot of the decree, without a bill, as the decree was for him; and it seemed reasonable, in order to save expense, that the executor, when sued, giving notice to the creditor, should be able to bring him in. The decree was in the nature of a judgment for all creditors, and as it cannot be pleaded at law, the jurisdiction must be given up, if it did not stop all proceedings, and all further costs at law, *after notice of the decree*, to be given by the party seeking to restrain the creditor.

The Lord Chancellor refused to grant the injunction, without an affidavit of the executor, as to the assets on hand; and the practice was adopted to prevent the abuse of bills

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being filed by a friendly creditor, in collusion with the executor, and a decree from being "snapped," as Lord Eldon expressed it, by a solicitor who was concerned for all parties, and an injunction procured, and then no money was to be found with the executor, while the creditor at law had thus lost the opportunity to fix him.

Lord Redesdale had occasion to declare the course of the English practice, and the rules of equity on this subject, in the case of *Largen v. Bowen*. (1 Sch. & Lef. 296.) He said, that if a creditor at law can obtain judgment before a decree, he will have obtained, and will be protected in his priority; and that Chancery would not restrain creditors at law against executors, merely on a bill filed by other creditors. But when a decree is obtained, the Court proceeds on the ground, that the decree is a judgment in favour of all the creditors, and that all ought to be paid according to their priorities as they then stand; and the Court could not execute its own decree, if it permitted Courts of law to alter the course of payment.

The practice in *Paxton v. Douglass*, was afterwards recognized in *Gilpin v. Lady Southampton*. (18 Vesey, 469.) It was the case of a bill by a creditor against an administrator. The usual decree was obtained, and on a motion for an injunction, Lord Eldon said, that where the answer did not state what the assets were, the executor must state them by affidavit, before an injunction would be granted, to restrain a creditor from proceeding at law. He observed, that these suits were generally by the executor, in the name of a creditor; the object was to give a judgment to all the creditors, and to secure a distribution of the assets, without preference to any, and that where once a decree was made, it was impossible to permit a creditor to go on at law. To close this part of the inquiry, I shall only refer to the case of *Dyer v. Kearsley*, in 1816. (2 Merivale, 482. note.) The motion there, was by the plaintiff,

the creditor who had obtained the usual decree, and then an action at law by another creditor, and a judgment by default. The motion was to restrain execution at law, and it was granted upon the usual affidavit of the executor, as to the state of the funds, and with a declaration that the plaintiff at law was entitled to his costs up to the time when he had notice of the decree, to be paid out of the assets.

We now perceive, that the observation of Sir *James Mansfield*, in 1 *Campb. N. P.* 148., was founded on the best authority, when he said, that the creditors of a deceased insolvent might always be compelled, through the medium of a Court of equity, to take an equal distribution of assets, without preference to any; and that it was only necessary for a friendly bill to be filed against the executor or administrator, to account, after which (that is, after the decree,) the Chancellor would enjoin any of the creditors from proceeding at law.

The doctrine, then, as finally settled in the *English Chancery*, is, that upon the usual decree to account, in a suit by one or more creditors against the executor, either singly for themselves, or specially on behalf of themselves and all other creditors, (for it makes no difference,) the decree is for the benefit of all the creditors, and in the nature of a judgment for all; and all are entitled, and are to have notice to come in and prove their debts before the Master; and that from the date of such decree, an injunction will be granted, upon a due disclosure of assets, upon the motion of either party, to stay all proceedings of any of the creditors at law. The establishment of this doctrine, and practice, is to be traced back to the decisions of Lord *Hardwicke*, Lord *Camden*, and Lord *Thurlow*, though the practice of staying proceedings, on motion, without a new bill, and of requiring a disclosure of assets to prevent abuse, is of more recent date. The usual decree for an account, or *quod computet*, is sufficient to warrant the interference with proceedings at law; and it is not necessary, as Lord *Thur-*

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The decree, whether in a suit by a single creditor for himself, or for himself and all the creditors, being deemed for the benefit of all, is in the nature of a judgment for all; and all the creditors are entitled, and should have notice to come in and prove their debt before the Master; and from the date of the decree, and on due disclosure of assets, an injunction will be granted, on motion of either party, to stay all proceedings of creditors, at law.

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low observed, in *Kenyon v. Worthington*, (cited in 10 *Fessey*, 40.) that the decree should be final, though, as we have seen, it is the *final* decree only upon a sum ascertained, that is equal to a judgment, and entitled to a preference in payment, if prior in time.

It would rather appear, that the doctrine of Lord *Hardwicke* and his successors, was only a necessary consequence of the principles long before recognized, that Chancery had concurrent jurisdiction in the case, and that final decrees were to be protected as equal to judgments. The latter practice became indispensable to support the acknowledged jurisdiction, inasmuch as the executor could not plead the decree in bar of a suit at law, and he would, therefore, have been exposed to a double charge. We have seen, that that great man and able lawyer, Sir *Joseph Je-kyll*, near a century ago, perceived the necessity, and expressed a strong opinion in favour of the rules and course of proceeding which prevail at this day. The only material variation between the former and the latter doctrine, is in respect to the distribution of the assets. Formerly, the decree seemed to be considered, judging from the more loose language of the cases, as a lien in favour only of the particular creditor who filed the bill; and creditors who were not parties to the suit, and were not judgment creditors, were to be paid out of the residue of the assets, in the course of administration, which would give specialty creditors a preference over simple contract creditors. But now, according to opinions to be deduced, as I apprehend, from the time of Lord *Camden*, they would all be paid rateably, after the judgment creditors were satisfied; and this not only on the general rule of equality, when equity distributes the fund, but also on the ground, that the usual decree to account, and allowing all the creditors to come in, rendered the decree in the nature of a *judgment in favour of all*.

Upon the whole, I consider myself bound by these doctrines and rules which are to be deduced from this review of the cases, and which have been the settled law of the *English* Chancery, for perhaps half a century. There has been no alteration in doctrine since, and only some improvements in the practice. The law of the Court, as it is now understood, seems to rest upon the clearest principles of justice, and it is not destitute of strong support in public convenience and commercial policy.

But to return to the further examination of the case before me: another object of the bill is to have the real estate, descended to the infant heirs of *Brown*, sold for the payment of the plaintiff's debt.

The administrators deny that they have interfered with the rents and profits of the real estate; and the defendant, *Elizabeth Brown*, admits, that she, under her claim of dower, and as mother of the children, has received the rents and profits, and expended them in the necessary maintenance of the infants. I am not disposed to call the mother to account for rents and profits so received and expended. There was a good deal of doubt expressed in the old cases, (*March v. Bennett*, 1 *Vern.* 428. *Waters v. Ebrall*, 2 *Vern.* 606. *Chaplin v. Chaplin*, 3 *P. Wms.* 365.) as to the duty of the guardian to apply the rents and profits of the real estate to pay the bond creditors of the ancestor. The guardian certainly ought not to be answerable for rents and profits applied for the support of the infants, prior to any due notice or application from the creditor. But the case of *Martin v. Martin*, already cited, shows, that the creditors may, by bill, obtain a decree for an account of the debts chargeable upon the real assets descended, and for the sale of them to satisfy the debts. In *Louthian v. Hassel*, (4 *Bro.* 167.) a bill was filed by creditors against the devisee, for sale and distribution of the real estate. The decree in that case was, that the Master take an account of the rents and profits of the real estate, and the estate was

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The widow and administratrix, who, under her claim of dower, and as guardian to her children, had received the rents and profits of the real estate, and expended them in the necessary maintenance of her children, was not held to account to a creditor, on bill filed against her and the heirs for an account, and for the sale of the assets descended.

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Creditors may file a bill against heirs and devisees, for sale and distribution of the real estate, in case the personal estate proves deficient. And it is no objection to such sale that the heirs are infants.

ordered to be sold, and the moneys arising from the sale, and on the account of the rents and profits, to be applied to make good the deficiency of the personal estate. In the present case, it would seem to be premature to take any order for the sale of the real estate, until the amount of the debts, and the deficiency of the personal estate, are first ascertained. I shall, therefore, make what, under the cases which have been examined, may be called the usual decree, to take an account of the debts and personal assets, and for rateable distribution, subject to preference of judgment creditors; and I shall include in it a direction to state the amount of the real estate, and of the incumbrances thereof, and reserve all further directions as to the real estate. The right of application to stay proceedings at law, either in respect to the personal or real estate, will, of course, be left open.

I have not considered it as any objection to a sale of the real estate, that the heirs are infants. In *Pope v. Guyn*, (8 Vesey, 28. note,) the heir was an infant at the time of filing the bill, and at the decree, directing a sale of the real estate to pay creditors of the testator; and the infant defendants in that case, who were co-heiresses at law, were ordered to convey, on coming of age, unless they should show cause to the contrary. The form of the decree is given in the note of that case; and it must have been considered, as it was a point in the case, that the parol should not demur, and so it was determined in *Hargrave v. Tyndal*. (1 Bro. 136. note.) The statute for the relief of creditors against heirs and devisees, makes provision, that in suits at law against the infant heir or devisee, the remedy shall not be suspended by reason of nonage; and the equity of that provision applies to this Court.

Decree.

The following decree was entered :

“ ORDERED, that it be referred to one of the Masters, &c.

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to take and state an account of what may be due to the plaintiffs upon their demand, stated in the bill, and to all other the creditors of the intestate from him, at the time of his death, either in his individual character, or as a partner of the house of *B. & F.*, in the pleadings mentioned; and whether by judgment, mortgage, or otherwise; and the Master is to cause reasonable notice to be given, in his discretion, either personally, or inserted in such public paper or papers as he may deem proper, for the said creditors to come in before him and prove their debts; and he shall fix a peremptory day for that purpose, and such of them who shall not come in and prove their debts by the time so to be limited, shall be excluded from the benefit of this decree; and such persons, not parties to this suit, who shall come in before the said Master to prove their debts, are, before they be admitted creditors, to contribute to the plaintiffs their proportion of the expenses of this suit, to be settled by the said Master. And it is further ordered, that the Master take an account of the personal estate of the intestate, which hath come to the hands of the defendants, (administrators,) or to the hands of any other person, by their order, or for their use. And it is hereby ordered, by way of special directions to the said Master, that in taking such account, the administrators be not charged with any loss sustained by the act of the defendant *F.*, on the undivided moiety belonging to the intestate, of the goods, chattels, and credits of the said firm of *B. & F.*, in possession of *F.*, by the administrators, and which undivided moiety is stated in their answer, to have been of the value of 3,601 dollars and 45 cents. And it is further ordered, that the administrators be charged with the amount, without interest, of assets, being in money and stock, or chattels, and amounting to 665 dollars and 76 cents, and put into the possession of *F.* by them, as part of the partnership stock between them; and that they likewise be charged with the amount in value of goods received by

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them upon the insolvency of *F.* from the said partnership stock, and stated by them to be of the value of 491 dollars; and that they likewise be charged with the amount in value of assets admitted to be in hand unsold, and stated by them to be of the value of 500 dollars; and that they be charged with moneys received from the debts of the continued partnership formed between them and the said *F.*, and stated by them to amount to 268 dollars. *And it is further ordered*, that they be credited with the debts of the partnership of *B. & F.*, for which they have made themselves personally liable, as and for so much money paid by them in a course of administration, and which said debts, with the interest and costs thereon, are estimated by them to amount to 1,583 dollars and 75 cents. *And it is further ordered*, in addition to these special directions, that the administrators be charged with all other assets which may have come to their hands, or to the hands of any other person for their use, and be credited with all other payments and dispositions thereof, by them made in a due course of administration. *And it is further ordered*, that the said Master make all just allowances to the said administrators for costs and expenses, but that no allowance be made, under the special circumstances of this case, by way of compensation for their time and trouble. *And it is further ordered*, that the said Master also state an account of the location, quantity, and value of the real estate of the intestate, whereof he died seized, and of the amount of the incumbrances thereon; that the Master report in the premises with all convenient speed, and that he report specially on any point, or apply for further directions, if he should deem it proper. *And it is further ordered and declared*, that the balance of the said personal estate that shall, upon such accounting, be found to be remaining in the hands of the administrators unadministered, be applied, in the first place, to pay and satisfy judgment debts against the said estate, according to their respective priorities in point of time; and if any assets shall then remain



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unadministered, that the same be applied to pay the plaintiffs, and all other creditors, if any, who shall have come in under this decree, and proved their debts before the said master; and if not sufficient to pay all of them, including their costs, then in rateable proportions, according to their respective amounts, and without any preferences, or regard to legal priorities. *And it is further ordered*, that if any proportion of the debts, and the costs and charges thereon, shall still remain unsatisfied, the plaintiffs, or any other of the creditors who shall have so come in under this decree, shall be at liberty to apply to this Court, on the foot of this decree, for a sale of the real estate of the intestate; and that the proceeds arising from such sale, be applied to satisfy the proportions of debts that shall remain due, but that all legal incumbrances upon such real estate shall have preference. *And it is further declared*, that the right of application on the part of either of the parties to this suit, for an injunction, if requisite, to stay proceedings on the part of any creditor at law, either in respect to the personal or real estate, or to stay proceedings on any mortgage upon the said real estate, is left open. And all other and further directions and questions are reserved."

**HALLOCK against SMITH and WILLIAMSON.**

A re-examination of witnesses is not of course, but only on special application to the Court, and on sufficient cause shown, by affidavit, or otherwise, according to circumstances.

On a bill to foreclose a mortgage, the mortgagor whose equity of redemption had been sold by the sheriff under an execution, at law, must be made a party; as he has, by the act of the 12th of April, 1820, (*sess. 43. ch. 184.*) one year from the sale, to redeem the land from the purchase, and, therefore, an existing right of which he cannot be divested within the year.

**BILL** to foreclose a mortgage. The defendants were purchasers, under a sale on execution at law, since the first

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day of *May* last, of the mortgagor's equity of redemption in the mortgaged premises, and received the sheriff's certificate of the sale and purchase, in pursuance of the act, entitled, "an act in addition to the act concerning judgments and executions," passed the 12th of *April*, 1820. The mortgagor, who, by that act, has one year from the sale to redeem the land from the purchaser, was not made a party to the suit. Issue was joined, and proof taken on both sides, and the cause regularly set down for hearing.

*S. B. Strong*, for the defendants, moved for a re-examination of two of the witnesses, who had been examined in chief and cross-examined, on due notice of the motion, and on the alleged ground of the insufficiency of their answers to some of the interrogatories. It was also objected, on the part of the defendants, that the mortgagor ought to have been made a party, or that his deposition (which was suppressed on the ground of his interest in the cause, as the defendants had set up fraud in the execution of the mortgage, and that the same was given without consideration) be read.

*G. W. Strong*, for the plaintiff.

THE CHANCELLOR said, that a re-examination was not of course, but at the discretion of the Court, on special application; and that in this case, the truth, as to the essential matters in issue, as far as it depended upon the examination of those witnesses, did not appear to require a further examination. The 22d rule of this Court declares, that a witness shall not be re-examined, but upon sufficient cause shown by affidavit or otherwise, according to circumstances. (Vide also, Lord *Bacon's* rule, n. 74. 17 *Vesey*, 434. 1 *Johns. Ch. Rep.* 140.) The motion was, therefore denied. But the objection, that the mortgagor was not a party, was well taken. He was entitled, within one year

from the sale, to redeem his interest in the mortgaged premises, from the purchasers under the execution, and, consequently, he had an existing right (of which he was not divested, within the year, by the sale, and could only be by foreclosure here,) to unite with that redemption, a redemption also of the premises from the mortgage incumbrance.

It was, accordingly, ORDERED, "that the cause stand over, with liberty to the plaintiff to amend his bill by making the said mortgagor a party thereto, or otherwise, as he shall be advised."

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**BENSON and others, Executors of RUTGERS, against LE ROY and others.**

Where a testator devised all his estate, real and personal, to four trustees, three of whom were his executors, in fee, in trust, to pay his debts, and then to distribute the residue: *Held*, that by the trust, the assets were placed under the jurisdiction of this Court. The statute, *sess.* 36. *ch.* 93. (1 *N. R. L.* 316.) does not interfere with the doctrine of equitable assets, by which all the creditors are to be paid equally, *pari passu*; for the omission of the 4th section, or proviso of the *English* statute, (3 *W. & M.* c. 14.) which excepted devises of lands for the payment of debts, does not vary its construction.

The Court will, therefore, in such case, enjoin a suit brought by a creditor, at law, for the purpose of gaining a preference over the other creditors.

THE plaintiffs, *Egbert Benson, Charles M'Evers, and Roswell L. Colt, executors of Anthony Rutgers, deceased*, in behalf of themselves and other creditors of *Jacob Le Roy, deceased*, who should come in and contribute to the expense of the suit, filed their *original bill*, on the 14th of *November, 1818*, Dec. 15th.

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against *Peter A. Jay*, administrator, with the will annexed, of *Jacob Le Roy*, deceased, *Martha Le Roy*, widow, and *Harriet, Goldsbrow, Mary and Cornelia*, children of the said *J. Le Roy*, and *Campbell P. White*, for an account of the real and personal estate of the said *J. Le Roy*, and for a sale of the real estate, and praying that out of the moneys thence arising, the plaintiffs, and the other creditors, who should come in, &c. might be paid their several debts, with interest and costs, and that all proper parties might join in the sale of the real estate. The original bill, also, set forth the substance of the will of *J. Le Roy*, by which he devised in fee, to *Herman Le Roy, Robert Le Roy, Jacob Livingston, and Roswell L. Colt*, all his estate, real and personal, in trust, to pay his debts, and then to distribute, &c. By the will, the said *H. Le Roy, Robert Le Roy, and R. L. Colt*, were appointed executors, with power to sell his real and personal estate, with the consent of his wife, the said *Martha. Jacob Livingston*, the other devisee in trust, was not an executor. The defendants named, appeared, and the bill was, afterwards, amended, by adding *Herman Le Roy, Robert Le Roy, and Jacob Livingston*, the above named devisees in trust, as parties defendant. Before the original bill was answered, the plaintiffs, on the 24th of May, 1819, filed a supplemental bill, stating, that since the original bill was filed, they had discovered and now charged, that *Jacob Le Roy*, at his death, was largely indebted, and, among others, to *John S. Roulet*, executor of *Victor Moreau*, deceased, by bond to the said *J. S. Roulet*, in his own right, to *Elizabeth Hyde, Mary Hoffman, and Robert Le Roy*, severally, on simple contract. That *Martha Le Roy*, widow, having procured assignments to her, by those creditors, in consideration of paying or securing to them, the payment of the said debts, in whole or in part, caused suits at law, for the recovery thereof, to be brought in the names of those creditors, against *H. L., R. L., J. L., and R. L. Colt*, the said devisees, and against the children, the heirs at law of the said

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*J. Le Roy* ; and that in *January* last, judgments, by confession, were obtained in those suits, (stating them,) that executions had issued on two of the judgments, and the sheriff of the City and County of *New-York*, by virtue thereof, had levied on all the real estate of *J. Le Roy*, and advertised the same for sale. That the debts, on which these two judgments were recovered, belong, by assignment, to the said *Martha Le Roy*, who had commenced and prosecuted the suits, in concert and collusion with the heirs and devisees, in order to secure to her a preference over the plaintiffs, and the other creditors, and to defeat that equality of payment which the plaintiffs sought to establish. *Prayer* for an injunction to restrain *Martha L.* from selling the real estate under those executions. The injunction was granted, *May 22d, 1816.*

The defendants answered. The material allegations in the bill were admitted, except as to the charge of collusion. *Martha L.* also stated, that she paid, out of her property, the debts mentioned, and took assignments thereof, and had obtained judgments and issued executions, in order to obtain, by legal diligence, priority of payment ; and she insisted on her right so to do.

*T. A. Emmet*, for the defendant, *Martha Le Roy*, now *November 4th* moved to dissolve the injunction. He cited *Stat. 3 and 4. W. and M. c. 14. s. 4.* (made perpetual by *6 W. 3. c. 14.*) as containing a clause, not inserted in our act. (*1 N. R. L. 316. sess. 38. ch. 93. s. 1.*) *1 Fonbl. Equ. b. 1. c. 4. s. 14. note i. 1 Madd. Ch. Pr. 254.* He insisted that the assets were legal, and liable to legal preferences under our statute.

*T. L. Ogden* and *Boyd*, contra, contended, that as by the will, the lands were devised for the payment of debts, they became equitable assets. They cited *Lupton v. Lupton, 2 Johns. Ch. Rep. 614. Toller's L. of Ex. 289, 413,*

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414, 415. 2 *Atk.* 50. 1 *Madd. Ch. Pr.* 473. 359. 438.  
*Moses v. Murgatroyd*, 1 *Johns. Ch. Rep.* 119. 130. 3 *Johns.*  
*Ch. Rep.* 52, 59. 349. 1 *Vernon* 45. *Prec. in Ch.* 430. *Gillb.*  
*Equ. Rep.* 111. 2 *Vern.* 708. 1 *P. Wms.* 430. 1 *Bro.*  
135, 136. n. 2 *Bro.* 94. 7 *Vesey*, 314. 8 *Vesey*, 26. 1  
*Rob. on Wills*, 211. 218. n. 2.

THE CHANCELLOR. The testator in this case devised all his estate, real and personal, to four trustees, (of whom three were made executors,) in fee, and in trust to pay his debts, and then to distribute the residue. Such a devise in trust places the assets under the jurisdiction of this Court. A Court of law does not take cognizance of a trust, but the notice of it belongs, peculiarly and exclusively, to this Court.

Before the statute of 3 *W. & M.*, if the testator devised his lands for the payment of his debts, all the creditors were to be paid *pari passu*, or in rateable proportions, for it was to be presumed that the testator meant to do equal justice to all. Thus in a case before Lord *Nottingham*, in 1681, (*Anon.* 2 *Ch. Ca.* 54.) the testator devised his lands to trustees to pay debts, and the trustees being themselves creditors, paid themselves in full, and left other creditors unsatisfied, who then filed their bill for a rateable payment. The Chancellor held, that under that devise, all creditors were to be paid equally, and that the trustees could not give themselves a preference.

The statute of *W. & M.* did not interfere with this doctrine of equitable assets, but rather gave it, as it has been said, a parliamentary sanction. That statute (3 *W. & M. c.* 14.) was made for a relief of creditors against fraudulent devises; and so the preamble to it, as well as its title, expressly declares. It does not apply to the case of a devise to trustees for the payment of debts, for such a devise is in furtherance of justice, and of the avowed policy and purpose of the statute. To mark that policy the more

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distinctly, the 4th section of the statute expressly excepted from its operation devises of lands for the payment of debts or children's portions. The omission of this proviso in our statute cannot make the least alteration in its construction. It must have been omitted, because it was unnecessary, and was doubtless inserted in the *English* statute for greater caution. It is impossible to suppose that an honest devise for payment of debts, could be affected by a statute made on purpose to protect creditors against fraudulent devises. The devisees intended by the statute, were those who took a *beneficial* interest under the will, to the injury of creditors. The statute does not apply to cases of trusts created by will to pay debts. This we cannot, for a moment, suppose. The general provisions in the *English*, and in our statute, (which are the same,) apply only to suits at law against heirs and devisees claiming the entire interest for themselves, and against whom judgment and execution may be awarded, for the lands which have come to their hands; but a judgment and execution at law against a naked trustee holding lands in trust for others, could not affect the rights of the *cestuy que trust*.

It is observed by *Fonblanque*, (*b. 1. c. 4. sec. 14. note.*) in a passage referred to by the counsel, that bond creditors are liable to be "prejudiced" by the power to devise for the payment of debts reserved by the statute of 3 *W. & M.*, because, that under such a devise simple contract creditors are entitled to be paid *pari passu*, and bond creditors will thus lose their legal priority. But that is a prejudice, if it can be so called, that the statute never intended to remove, because, as I observed before, the whole object of it was to defeat *fraudulent* devises; and the payment of debts by a just and equal distribution of the debtor's fund, is not a hardship, and much less a fraudulent provision towards any person. It is an act of such justice and pure equity, that the Legislature has always been solicitous to encourage it.

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Thus the statute provides, (1. *N. R. L.* 452.) that when real estate is sold by order of the Court of Probates, or of a Surrogate, for the payment of debts, the proceeds are to be distributed among the creditors, in proportion to their debts, without giving preference to specialties. The assignees of insolvent debtors are also directed, by another statute, (1 *N. R. L.* 469.) to make distribution equally among creditors, without giving preference to specialties. The same rule is also directed by another statute to be observed (1 *N. R. L.* 161.) by trustees of absent or absconding debtors. And we may safely conclude, that though the first section or proviso in the English statute of *W. & M.* was omitted in our statute, the omission could not have been intended to perpetuate the common law doctrine of preferences between creditors, in case such a trust should be created by will. Such a devise in trust must be a valid devise, and subject to equity distribution. That will not be disputed. It must follow, then, of course, without some express statute provision to the contrary, that the fund is to be regarded as equitable assets.

In *Fremont v. Dedere*, (1 *P. Wms.* 429.) it was admitted, that if lands be devised for the payment of debts, they were to be considered as equitable assets, and bonds, and simple contract debts were to be paid equally. In *Deg v. Deg*, (2 *P. Wms.* 412.) a distinction seemed to be made between a devise to executors, and a devise to strangers to pay debts; but in that case, it was admitted, that if the devise was to executors, and to a third person, (as was the case in the present instance,) the same conclusion followed. But this distinction has been since exploded, and the law of the Court on the subject was fully discussed and settled by Lord Camden, in *Silk v. Prime*. (1 *Bro.* 138. note. *Dickens*, 384.) The testator, in that case, charged all his real estate with the payment of his debts, and directed his executors, and their heirs, to sell it, if wanted for that

+ fourth



purpose. The Master of the Rolls decreed, that the assets arising from the sale were to be considered equitable assets, on the ground, that the devise was to the executors and their heirs, by which means the descent to the heir was broken. This decree was affirmed, on appeal, in 1768, by Lord *Camden*, and he observed, that the assets did not come to the executors in their character as executors, and the rule was settled, that the assets were not legal, unless the executors took them *qua* executors. A devise to executors, and their heirs, made them *trustees*; and though the real and personal estate were made one fund by the will, yet Lord *Camden* did not regard that objection, but said that Chancery marshalled the assets. The charge, in that case, was considered as amounting to a trust, and being a trust, equity directed the execution of it upon equitable principles.

In *Newton v. Bennet*, (1 Bro. 135.) Lord *Thurlow* referred to the former case, and said, that an estate devised to an executor to sell, was equitable assets; and from some correct notes of this case, (7 *Vesey*, 321. 322. 8 *Vesey*, 30.) it appears, that he did not consider it to be requisite that the descent should even be broken by the devise, to render the assets equitable. It has since been repeatedly held, (*Bailey v. Ekins*, 7 *Vesey*, 319. *Shepherd v. Ladridge*, 8 *Vesey*, 26.) that a mere charge of the debts upon the real estate by will, makes it equitable assets, even though the descent be not broken. It is sufficient that the estate be devised upon trust to pay debts; and a charge of the debts upon the real estate, is, in substance and effect, a devise *pro tanto*. This was the doctrine of Lord *Eldon* in those cases; and he made this clear and pertinent observation, that a provision by will, effectual in law or equity for payment of creditors, was not a fraudulent devise within the statute. And I may add, that such a devise is equally valid and innocent, and commendable withal, as it would be under the protection of the proviso in the *English* statute.

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The case now before me steers clear of every difficulty. It comes within all the cases, ancient and modern. Here the descent is broken, and here is a devise in fee, and to a stranger, as well as to the executors.

Seeing, then, that here has been a trust created by will, for the payment of debts, this Court is bound to take care that the trust is executed ; and to interpose, if necessary, against a proceeding at law intended to defeat it. Lord *Eldon* admitted this consequence in *Shepherd v. Lutwidge*. The widow of the testator has been purchasing in debts due from the estate, and suing them at law, with the avowed purpose of gaining, by her diligence, a legal preference over other creditors. This has been done with knowledge of the provisions in the will, in which she had a personal interest, and with full notice of the trust. Her acts have tended to defeat the trust, and to prevent this Court from causing it to be executed by a fair and equal distribution of the fund rateably among the creditors. In such a case, a race of legal diligence cannot be permitted, nor can such a creditor, and more especially a voluntary purchaser of debts, who was a party under the will, and had due notice of its provisions, be suffered to change the character of the assets, and turn them from equitable into legal. This would be to wrest the trust from the jurisdiction of this Court, and destroy the rights of the *cestui que trusts*, who are the creditors at large.

Motion to dissolve the injunction denied.

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v.
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**M'COMB and WEEKS, Executors of OGILVIE, against  
WRIGHT.**

It seems, that there is no difference in the construction of the 11th and 15th sections of the *statute of frauds*, (sess. 10. ch. 44. 1 *N. R. L.* 75.) or the 4th and 17th sections of 29 *Car. 2. c. 3.* as to what is a sufficient signing of the contract by the party to be charged.

An auctioneer is an agent lawfully authorized by the purchaser, either of lands or goods, at auction, to sign the contract of sale for him, as the highest bidder; and writing his name, as the highest bidder, in the memorandum of the sale, by the auctioneer, immediately on receiving his bid and knocking down the hammer, is a sufficient signing of the contract within the statute of frauds, so as to bind the purchaser.

Where the defendant bids, at auction, for another person, but does not, at the time the lot is knocked down to him, nor on the day of sale, disclose to the plaintiffs, nor to the auctioneer, the name of his principal, he is responsible as the purchaser.

If there is any doubt or difficulty as to the title, it will be referred to a Master to examine, and report thereon.

**THOMAS OGILVIE**, by his last will, dated the 8th of <sup>October 30th,</sup> *September*, 1812, empowered his executors to sell his estate at auction, and to execute deeds for the real estate, to the purchasers in fee; and to divide the proceeds among his children, and appointed his wife and the plaintiffs, executors. The testator died on the 18th of *March*, 1816, and his wife died on the 12th of *May*, 1818. The plaintiffs, on the 13th of *January*, 1819, sold at auction a lot of land in *Beekman Street*, of which the testator died seised, to the defendant, who was the highest bidder, at 8,900 dollars. There was a printed paper containing the terms of sale: to wit, that the property was free and clear of all incumbrance, and the title unexceptionable: ten per cent. to be paid on the day of sale, and the remainder on the 1st of *May*, when deeds were to

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be given ; 5,000 dollars on the lot in *Beekman Street*, might remain on mortgage. At the bottom was added, in writing, " interest to be paid half yearly. The lot in *Beekman Street*, to be sold subject to the opening and improving of *Beekman Street*." The auctioneers, immediately after the sale, endorsed on this paper : " Lot in *Beekman Street*, bought by *Isaac Wright*, for 8,900 dollars. *New-York, January 13th, 1819. Hoffman & Glass*;" as a memorandum of the facts. The defendant bid, and the lot was struck off to him in the usual manner. The day after the sale, the defendant paid to the auctioneers the deposit of 890 dollars, according to the conditions of sale. The bill charged, that the defendant, by *Hoffman & Glass*, auctioneers, as his agents, signed an agreement, or memorandum, in writing, attached to the printed conditions of sale, acknowledging himself to be the purchaser, &c. That in *February* following the time of sale, the title deeds were delivered to the defendant, and remained with him for a month, to which he made no objection until about the 1st of *May*; that on the 1st of *May*, the plaintiffs tendered the deed of conveyance to him, and the possession, on his paying the residue of the purchase money, which the defendant refused. *Prayer*, that the defendant may be decreed specifically to perform his contract, and to pay the residue of the purchase money, on the plaintiffs executing to him a proper deed, &c. and for general relief.

The defendant, in his answer, admitted the sale at auction, and that some memorandum of the purchase was made by the auctioneers, *H. & G.*, at the time; that he was authorized by *Jeremiah Thompson* to bid for him, and did bid accordingly, the sum of 8,900 dollars. He denied that the auctioneers were his agents. He admitted the terms and conditions of the sale, and that, immediately after, he received *J. T.* 890 dollars, being ten per cent. of the purchase money, which he paid to the auctioneers, to whom he declared, that the purchase was not for himself, but for *J. T.* He

admitted, that on the day of sale, or a few days thereafter, he requested the plaintiffs to have the deed made to *J. T.* That the plaintiffs never objected, but treated with *J. T.* as the purchaser, and had a deed made out to him, and which they tendered to *J. T.* as early as the 1st of *April*. That *J. T.* caused the title to be investigated and examined by counsel, who gave an opinion in writing, that the title was defective, and, for that reason, *J. T.* declined accepting the deed. That the plaintiffs negotiated with *J. T.* as the principal in the purchase. He admitted, that the plaintiffs tendered to him a deed about the 1st of *May*, and showed him the opinion of ~~the~~ counsel in favour of the title; and that he refused to accept the deed. He submitted, that *J. T.* ought to have been made a party, and alleged the statute of frauds, of which he claimed the benefit, as if pleaded, &c.

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The cause was brought to a hearing on the pleadings and proofs. *October 30th.*

*Riggs* and *H. W. Warner*, for the plaintiffs. To show, that the memorandum of the contract of sale made by the auctioneers, was sufficient to satisfy the statute of frauds, they cited 2 *Taunt. Rep.* 38. 4 *Taunt. Rep.* 209. 3 *Vesey & Beames*, 57. 3 *Merivale's Rep.* 62. 3 *Burr. Rep.* 1921. 7 *East*, 565. 589. 14 *Johns. Rep.* 484.

*T. A. Emmet*, contra. He cited 1 *Esp. N. P. Rep.* 101. 2 *Esp. N. P. Rep.* 659. 1 *Bos. & Pull.* 306. 7 *Vesey*, 341. 13 *Vesey*, 456. *Sugden's Laws of Vend.* ch. 1: p. 25. 8 *East*, 248. 10 *East*, 283. 1 *Taunt. Rep.* 430. 5 *Taunt.* 170.

**THE CHANCELLOR.** The leading question in this case is, whether there was a valid purchase by the defendant, within the statute of frauds.

The premises were sufficiently described in the printed advertisement of the time and place of the sale at auction.

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The terms of sale were also particularly stated, viz : *ten per cent. to be paid on the day of sale, and the remainder on the first day of May following, when the deed and possession would be given, and 5,000 dollars of the purchase money were to remain on mortgage at the option of the purchaser.* To these printed terms there was added, in writing, at the bottom, "the interest to be paid half yearly, and the lot to be sold subject to the assessment of opening and improving *Beekman Street.*"

It is proved by the auctioneers, that the lot was sold to the defendant, subject to the terms and conditions stated and set forth in these printed and additional written terms, and that on the day after the sale, the defendant called and paid to them the ten per cent. on the purchase money. The defendant admits the condition of sale, and particularly that the lot was sold subject to the assessments for opening and improving the street. The terms of sale were well understood previous to the sale, and the defendant never made any objection or pretended to any misunderstanding on that point. The sale was also conducted in the usual manner; the defendant signified the bid at which the lot was struck off to him, in the customary manner, and the auctioneers immediately made a memorandum of the fact, with a pencil, in these words, "lot in *Beekman Street* bought by *Isaac Wright* for 8,900 dollars." They, also, immediately inserted the defendant's name in writing in an indorsement in the same words on the back of the paper to which the printed advertisement was attached, and on which the additional conditions were written, and to which indorsement the auctioneers' names were subscribed.

The sale was in *January*, and no difficulty or impediment arose as to the contract of sale, or as to the completion of the purchase, until objections were made in *April* following to the title, and on that ground the refusal to perform the contract was placed. The suggestion that the

contract was void by the statute of frauds, because the defendant had not signed any agreement or memorandum, was quite an afterthought, of which no trace appears until we come to the defendant's answer.

The question has been raised and well discussed by the counsel, whether the auctioneers were competent agents of the purchaser, for the insertion of his name in the memorandum of the sale. It will not be disputed, that if the purchaser's name appears in the body of the memorandum, and was inserted there by himself or by his authorized agent, it is a signing within the statute of frauds. This was settled by the Court of Errors in *Clason v. Bailey*. (14 Johns. Rep. 484.)

The words of our statute are, (1 N. R. L. p. 78. sec. 11.) that "no action be brought to charge any person upon any contract or sale of lands, or any interest in or concerning them, unless the agreement, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized." The words of the statute in relation to the sale of goods, and which are to be considered in connection with the other provision, relating to lands, since the decisions on both the sections are frequently compared together, are as follows: (ib. sec. 15.) "No contract for the sale of any goods for the price of 10l. or upwards, shall be good, unless earnest be paid, &c. or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged, or their agent thereunto lawfully authorized."

It appears to be now settled, by the *English* authorities, that the construction of each of these sections, as to what is a signing by the party to be charged, is and ought to be the same, and that the auctioneer is a competent agent to sign for the purchaser either of lands or goods at auction; and the insertion of his name as the highest bidder in the memorandum of the sale by the auctioneer, immediately on

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receiving his bid, and striking down the hammer, is a signing within the statute, so as to bind the purchaser.

The case of *Simon v. Motivos*, (3 Burr. 1921. 1 Black. Rep. 599.) in 1776, is the earliest case we have on the subject. That was a suit against a purchaser of goods at auction who did not take them. He bid for one *Durant*, but did not name him as principal. The auctioneer, when he knocked down the goods to him, put down the defendant's name in the usual manner as the purchaser, and the defendant came the next day and saw the goods weighed. The question was, whether this was a contract in writing within the statute of frauds. The Court of K. B. held clearly, that the auctioneer must be considered as agent of the buyer, after knocking down the hammer, and that setting his name down in writing was sufficient to take the case out of the statute. The auctioneer was considered to be, to many intents, the agent of both parties. He was agent to the buyer, *pro tempore*, and giving in his name was an authority to the auctioneer to set down the contract.

The Judges in that case threw out a doubt whether sales at auction were within the policy and intention of the statute of frauds; but that if they were, the requisites of the act were complied with.

Another decision on the same section of the statute, took place, after an interval of forty years. I allude to the case of *Hinde v. Whitehouse*, (7 East, 558.) decided in the K. B., in 1806. That was the case of a sale of goods, and the auctioneer immediately wrote the name of the purchaser against the lot of goods purchased; the purchaser being sued by the vendor, he insisted that there was no *memorandum* in writing, within the statute, to charge him. But the Court held, that the auctioneer must be taken to be the agent of both parties, so as to bind the purchaser by his signature. It was considered that the practice had become so settled, and had been so uniformly held, since the



case of *Simon v. Motivos*, that the auctioneer was, at the sale, the agent of both parties, that it would be dangerous to shake the rule.

These are cases relating to the sales of goods; and I shall now notice a series of decisions on the other section of the statute relating to sales of land.

The first case was a *nisi prius* decision of Ch. J. *Eyre*, in *Stanfield v. Johnson*, in 1794. (1 *Esp. N. P.* 101.) Copyhold lands had been put up at auction, and knocked down to the defendant, and his name was written in the catalogue, against the lot, as the purchaser. He refused to pay and complete the purchase, and set up as a defence the statute of frauds. The Chief Justice admitted the defence to be good, and that the case of *Simon v. Motivos* applied only to a sale of goods. Afterwards, in *Buckmaster v. Harrop*, (7 *Vesey*, 341.) the same point arose before the Master of the Rolls, in Chancery. Certain estates were sold at auction to an agent of *F.*, and the agent, immediately after the sale, declared that he bought for *F.*, who offered to pay the deposit of 10 per cent., and the auction duty, to the auctioneer. A bill for specific performance was brought by the heir of *F.*, the vendee, against the representatives, including the residuary legatee of *W.* the auctioneer. The Master of the Rolls dismissed the bill, and observed, as Ch. J. *Eyre* did, that *Simon v. Motivos* did not extend to land, and that the name of the vendee, being put down by the auctioneer, was not sufficient.

It is to be observed, that it did not appear in that case, according to the report of it, that the auctioneer actually wrote down in a memorandum, the name of the purchaser. The case, therefore, is no authority, beyond the *dictum* of the Court. This same case was afterwards heard, on appeal, before Lord Ch. *Erskine*, (13 *Vesey*, 456.) and he said, as Lord *Eldon* had done before him, that the statute in both clauses, admitted of but one construction; that if the auctioneer put down the name of the purchaser, there

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was a contract in writing by an agent, and he should be disposed to say the statute was satisfied. But, he observed, that there was no clear evidence of any written memorandum so signed at the time.

The opinion of Lord Eldon, referred to in that case, was in *Coles v. Trecothick*. (9 Vesey, 249.) He there expressed a strong opinion, that an auctioneer, taking down the name of the buyer, was a signing within the statute, as to lands, and that it was impossible to hold otherwise, and leave the case of *Simon v. Motivos* undisturbed. "It was," he said, "very singular, that after, and without disturbing that case, it was held at *nisi prius*, by Lord Ch. J. Eyre, that it would not do as to land. Why not? The form of the two clauses is not the same, but the terms, as to the memorandum in writing, were exactly the same." It was clearly now settled, he observed, that an agent need not be authorized in writing.

Thus far, the weight of authority is, at least, equal in favour of extending the doctrine in *Simon v. Motivos*, to the section relating to lands. It is rather stronger on that side, since the opinions of Lord Eldon and Lord Erskine are the latest opinions, and are founded on more consideration of the subject, and more argument. The observation of Lord Eldon, that the two clauses of the statute cannot be distinguished in this respect, is unanswerable, and renders the decision as to auction sales of goods, an authority perfectly applicable to sales of land.

But I proceed to later cases, which show that the point is now entirely settled at law and in equity. Indeed, as Lord Eldon observed, (18 Vesey, 183.) Chancery professes to follow the Courts of law in the construction of the statute of frauds.

In *Emmerson v. Heelis*, (2 Taunton, 38.) there was a sale at auction of a crop of turnips then growing upon the land, and the defendant, being the highest bidder, was declared to be the purchaser, and his name was written in the sale

bill by the auctioneer, opposite the lot of turnips sold. He signed no agreement, nor did the auctioneer, otherwise than by putting down his name as a purchaser.

The Court of C. B., decided that this was an interest in land within the 4th section (11th of our act) of the statute of frauds; that the auctioneer was agent for the purchaser, and the statute satisfied, because, the memorandum in writing was signed by an agent for the party to be charged. He writes down the purchaser's name, by authority of the purchaser, who bids, and announces his bid to the auctioneer for that purpose. He is, therefore, an agent for the purchaser, and a contract signed by such an agent, is binding; and an agent for the buyer need not be authorized in writing.

This plain and simple statement of the case, by Sir J. Mansfield, seems to render the argument too clear for much illustration.

The next case, on the same point, and to the same effect, is that of *White v. Proctor*, (4 Taunton, 209.) decided in the same Court, in 1811. One of the conditions of the sale of an estate, in that case, was, that the bidder should sign a contract for the purchase. The defendant, by his agent, was the highest bidder, and the auctioneer immediately entered his name, as the purchaser, and the price, in a memorandum paper of the lot and terms. There was no other signature, and the defendant, by his agent, refused to sign the written contract of the purchase. The name of the auctioneer was not written on the paper. The Court held, that the omission of the auctioneer's name was immaterial, and that this case could not be distinguished from the other. "Entering the name of the buyer, by the auctioneer, in his book, was just the same thing as if the buyer had written his own name."

These decisions at law were followed by Sir Wm. Grant, in *Kemys v. Proctor*, in 1814. (3 Ves. & Bea. 57.) The defendant, by his agent, bid at auction for an estate, and it was struck off to him, and the auctioneer immediately made

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a *memorandum* in his sale book, that the defendant was the purchaser. The defendant, when the parties retired to settle the deposit, refused to pay the deposit, or sign the agreement. The bill was then filed against the vendor, to compel a specific performance, and it was accordingly decreed. The Master of the Rolls, said he felt himself bound by the two consecutive judgments in a Court of law, though if the question was open, he should say the auctioneer was not the agent of the buyer.

The question before me is, therefore, definitively settled in the *English Courts*, and they all proceed on the decision in *Simon v. Motivos*, by Lord Mansfield, upwards of fifty years ago; that case settled the fact of the agency of the auctioneer, for the buyer, when he enters his name, by his direction, upon his bid, in the *memorandum* of the sale, which is a bill of particulars of all the essential terms of the contract. If that case was well decided, all the cases that followed it were correctly decided, for there is no distinction in the construction of the two sections of the statute, as to what is a proper signature of the buyer by his agent. That case is a binding authority, and ought not to be shaken, for it has been the uniform rule ever since, as well with us as in *England*; and it appears to me, that there is no answering the short and decisive reasoning which the *English Judges* have employed in support of that construction.

The present case comes up to those in the *English Courts*, in all points, and is stronger than most of them. Here was no condition of sale that the buyer was to sign a contract for the purchase, as in *White v. Proctor*. Here was no quick renunciation of the purchase, or alleged mistake, or misrepresentation, as in another of the cases cited. The defendant here called the next day and paid the deposit, and never thought of any other objection than the defect of title, until the bill was filed. I have no difficulty, therefore, in

concluding, that the defendant was legally bound by the sale.

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Nor do I apprehend any great inconvenience from adhering to that settled construction of the statute of frauds. The history of auction sales does not warrant any such apprehension. They have too much publicity and solemnity attending them, to admit of much fraud or mistake; and Lord *Mansfield* and his brethren, thought these circumstances so strong, that they were led to doubt whether auction sales were even within the statute. To apply the statute to the case before me, would work a mischief not within its intention. A sale was made, in this case, in the usual manner; and all parties considered the contract as valid and binding, provided the title was good. The defendant carries it partly into effect; and after several months of negotiation, the defect of title is alleged. If true, in fact, it is a good objection, but the defendant is not contented to abide by that objection. Perhaps, the property has since fallen in value, and the defendant now sets up, as a defence, that the case is within the statute of frauds. This operates like a fraud upon the plaintiffs, who have thereby lost an opportunity to sell.

2. But, it is further objected, that the defendant purchased as the agent of one *Jeremiah Thompson*, who ought to have been made a party, if not the sole party, since the defendant, after the sale, disclosed that *Thompson* was the principal, and the plaintiffs negotiated with him concerning the deed.

The answer to this is, that the defendant purchased as principal, and did not disclose to the plaintiffs, nor to the auctioneers, either at the sale, or on the next day, when he paid the deposit money, that he acted in the character of agent of *Thompson*. The contract was made with him, as principal, and he cannot withdraw himself afterwards from responsibility as such. To admit a party to do this, would lead to all kind of evasion, abuse, and fraud. In *Simon v.*

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*Motivos*, the defendant bid for another person, but did not name him at the auction, as principal, and he was held responsible as the buyer. It is not true, in point of fact, that the plaintiffs ever recognized *Thompson* as the purchaser, and discharged the defendant. They uniformly treated with the defendant as the party bound to them, and were willing to insert *Thompson's* name as a grantee, merely to accommodate the defendant. The contract was entirely and absolutely with the defendant; there was no necessity for making *Thompson* a party to this suit, for the sub-contract between the defendant and *Thompson*, was *res inter alios acta*, and had nothing to do with the primary contract between the plaintiffs and the defendant.

I shall, accordingly, "declare, that the contract of sale between the parties was lawfully executed, and binding upon the defendant by the insertion of his name in the memorandum, which the auctioneers, as his agents for that purpose, did, in writing, immediately after taking down his bid; and I shall further declare, that the defendant did not, and would not, without the consent and agreement of the plaintiffs, (and no such consent and agreement appears,) withdraw himself from the obligation of the contract by presenting *Thompson* as his substitute, when he did not disclose, either to the plaintiffs, or to the auctioneers, at the time of entering into the contract, that he acted as agent for *Thompson*. And I shall direct the usual reference to a Master, to examine whether a good title can be given by the plaintiffs, for the house and lot sold to the defendant; and that he give to the defendant's solicitor due notice of the examination, and that the evidence taken in chief, in this case, on the point of title, be submitted to the Master, together with such other competent proof as the parties, or either of them, may think proper to furnish; and that he report an abstract of such title, together with his opinion thereon, with all convenient speed."

Decree accordingly.

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A. BRINKERHOFF and others against BROWN and others.

This Court does not, of course, interfere to aid or enforce executions on judgments at law. If a creditor seeks the aid of this Court against the real estate of his debtor, he must show a judgment at law creating a *lien* on such estate : and if he seeks aid in regard to the *personal* estate, he must show an execution giving him a legal preference or lien on the goods and chattels, which he has pursued to every available extent at law, before he can resort to equity for relief.

It is not sufficient that the plaintiff has become a judgment creditor, in the intermediate time between the bill and the answer. And where the defendant has made all the discovery sought for in the bill, he may object to the relief, at the hearing, on the ground that the plaintiff does not show a judgment and execution at law.

THE bill was filed July 3, 1818, against *Mathew Brown, junr., Silas Smith, Oliver Culver, Ira West, Russel Smith, and Benjamin Huntington*, trustees of the *Genesee Manufacturing Company*, and stated, among other things, that in *October, 1817, Russel Smith*, one of the defendants, applied to the plaintiffs, to purchase goods on credit, and offered the notes of the *Genesee Manufacturing Company*, which was incorporated in *March, 1811*, as security. That *S.* represented himself and the five other defendants as trustees of the company ; that the company, whose machinery had cost 15,000 dollars, was perfectly solvent, and their business prosperous, and referred the plaintiffs to *B. Huntington*, one of the defendants, for information ; that *H.* showed the plaintiff, *A. B.*, a letter from the five other trustees, representing the company as solvent and prosperous, and pledging their individual responsibility, to the amount of 3,000 dollars, for cotton, which *H.* was to buy on a credit. That confiding in these representations, the plaintiffs, *A. B.*, and *J. B.* sold to *R. S.*, on the 20th October, 1817, goods to the amount of 3,789 dollars and 79

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cents, at six months credit, and took his note for the amount; and the other two plaintiffs, *Duryea & Heyer*, at the same time, sold to *R. S.* goods to the amount of 1,854 dollars, on the same credit, and *A. B. & J. B.* plaintiffs, also received two notes for 3,944 dollars each, of the *Genesee Manufacturing Company*, one payable *January 1st, 1818*, and the other on the *1st January, 1819*, as collateral security, for the goods purchased of all the plaintiffs. That the notes of *R. S.* became due and remained unpaid; and that one of the notes of the *Genesee Manufacturing Company*, also became due and payment was refused, &c. That the plaintiffs, *A. & J. B.*, caused the said note to be put in suit, which suit was now pending undetermined in the Supreme Court. That, afterwards, the defendants, except *Huntington*, with a view to possess themselves of the property of the company, for their own benefit, and in violation of their trust, and of the rights of the plaintiffs, fraudulently caused a judgment to be entered up on a bond and warrant of attorney executed by the company, in favour of the defendant *H.* for 1,928 dollars and 33 cents, on the *23d March, 1819*; and a *fi. fa.* to be issued on the said judgment, by virtue of which, all the machinery and personal property of the company were seized and sold, on a few days notice, without the knowledge of the plaintiffs, for 600 dollars, and those defendants, or some of them, became the purchasers; and that the said defendants, also, caused the real estate of the company to be sold under the *fi. fa.* &c. Prayer, that the said judgment may be decreed null and void, and the real estate of the company discharged from it; that the sale of the personal property may be declared void; and that the defendants be enjoined from removing or disposing of the machinery, and other personal property, of the company, and from all proceedings under the judgment, or from confessing any judgment to others; and for general relief, &c.



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The defendants, *B., S. S., C., and W.*, in their answer, said, that in *October*, 1817, they authorized *R. Smith* to purchase cotton for the manufactory, and the defendants, *B., C., W., & R. S.*, signed a writing, engaging to be responsible for an amount not exceeding 3,000 dollars, either as trustees, or individually. That *R. S.* purchased of the defendant *H.*, in *New-York*, cotton to the amount of 1,896 dollars and 77 cents, and gave his notes for the amount, and the said writing, as collateral security. That they gave this guaranty as sureties for the company, and not on their own account. That the notes of *R. S.* being unpaid, *H.* gave them notice that he should look to them on the guaranty; that to secure themselves, they proposed to *H.* to confess a judgment for the amount of the debt, which was accordingly done, and an execution issued thereon in *April*, 1818, by which the machinery and personal property of the company were sold for 555 dollars, the greater part of which was purchased by the defendant *B.*, and the residue by *W.* That this property cost about 23,000 dollars; but that it would not sell for more than the amount at which they purchased it, in cash. They admitted, that the two notes stated in the bill were given by *B.*, as agent of the company, and by order of the trustees.

The defendant, *Huntington*, in his answer, stated, that *B., C. and W.* wrote to him, in *March*, 1818, as trustees of the company, and proposed to give him a judgment, as security for his debt; that the defendant, in his answer, submitted the business entirely to the direction of the other defendants, and sent a letter to be handed to an attorney, to have the judgment entered up, and the execution issued, as they might direct. The judgment was entered on a bond given by *B.*, by order of the company, and under their corporate seal. He admitted, that 779 dollars had been since paid in part of the amount of the debt due to him.

A number of witnesses were examined; and the cause was brought to a hearing in *June* last, when the bill was

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dismissed, on the ground, that the plaintiffs did not state themselves to be judgment creditors; and that it appeared by the bill, that the suit at law which was brought by two of the plaintiffs, as trustees for all the plaintiffs, on a note given by the *Genesee Manufacturing Company*, was "pending and undetermined."

A *rehearing* having been ordered, and the cause coming on to be reheard, it was admitted, that the judgment was entered up in the suit of the two first named plaintiffs, on the note as mentioned in the bill, on the 13th of *August*, 1818.

*T. A. Emmet* and *G. Brinckerhoff*, for the plaintiffs, contended, 1. That the defendants should have taken advantage of any alleged defect in the bill, by demurrer; and that it was too late to raise the objection after they had answered. (2 *Atk.* 136. 2 *Johns. Ch. Rep.* 369. 2 *Caines' Cases in Error*, 40. 56.)

2. That the plaintiffs, having stated themselves to be creditors of the defendants, and having obtained judgment before the hearing, the bill was good. (3 *P. Wms.* 351. 1 *Atk.* 285. note.)

3. That a supplemental bill may be filed after a cause has been heard. (3 *Atk.* 110. 217. 1 *Madd. Ch. Pr.* 405. 1 *P. Wms.* 445.)

4. That the judgment confessed in favour of *H.*, and all subsequent proceedings, ought to be set aside; 1. Because the judgment was confessed by the trustees, for their individual indemnity, and in fraud of their *cestui que trusts*; 2. Because, two of the defendants, being *trustees*, became purchasers under the sheriff's sale; 3. Because, the price at which the property was sold, was wholly inadequate.

*Griffin*, for the defendants, contended, 1. That the bill ought to be dismissed for want of equity; for no creditor

is entitled to the aid of this Court, until he has proceeded to judgment and execution at law.

2. That the judgment in favour of the defendant *H.*, was *bona fide* and valid, and ought not to be disturbed ; 3. That the sale, under the execution, was regular, and ought not to be disturbed.

The cause stood over for consideration to this day.

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**THE CHANCELLOR.** The cause is now brought to a re-hearing on the fact admitted by the counsel for the defendants, that judgment was entered in the suit at law, in *August*, 1818, between the filing of the bill and the coming in of the answers, and the question is, whether, *with that fact conceded*, the plaintiffs are entitled to the relief sought. The prayer of the bill is not merely for discovery ; it is that the judgment confessed to *Huntington*, and the execution and sale thereon, be set aside, and that the defendants be enjoined from disposing of the personal property of the company.

I should be very much inclined to direct a re-sale of the personal property of the company purchased in by the defendants, *Brown* and *West*, if the plaintiffs had placed themselves in a situation to entitle them to such a special interference in aid of their remedy at law. The defendants who purchased, were trustees of the company, and the execution on *Huntington's* judgment appears to have been issued, and the sale and purchase made by those trustees, chiefly for their personal advantage and indemnity. The property of the company was sold in a very hurried manner, and at an enormous sacrifice, under their direction ; and the object of the trustees, and particularly of *Brown*, the chief agent, was to change the title of the property which they held as trustees, from the company to themselves. I think such an arrangement is too suspicious in itself, and too dangerous in its tendency, to be permitted, but upon the condition of having the property put up again for sale, at the instance of creditors, at the price which the trustees bid. The facts speak

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in a strong language. Here was an execution of a creditor procured and issued under the direction of *B. & W.* as defendants, against them, on trust property, in their possession as trustees, and purchased in by themselves for their own benefit. The doctrine in *Davoue v. Fanning*, (2 *Johns. Ch. Rep.* 252.) is applicable to the case.

I do not perceive that any fraud is to be imputed to the defendant *H.* The execution was issued under his authority, but he was no party, in fact, to the proceedings under it; he only left the defendants as friendly debtors, to secure him as well as they could. There is no doubt that his debt fairly arose, and is justly due. It is the manner in which they managed the judgment and execution for their own benefit, and not for his, that constitutes the ground of complaint. As far as he has received the avails of his execution, he is entitled to retain them; and he is entitled to go on with his execution against the real estate. The remedy that the plaintiffs would be entitled to, if a proper case was made out, would be against the personal property so purchased in by the two trustees.

But, I am sorry to say, that the plaintiffs have not shown enough, when they only show themselves to be judgment creditors. If they want relief, touching the personal assets of their debtor, they must show that they have taken out execution at law, and pursued it, to every available extent, against the property, before they can resort to this Court for relief. I apprehend this to be the settled rule in Chancery; and that this Court does not, as of course, assume jurisdiction, in taking executions upon judgments at law into its own hands. Such power would be oppressive to the debtor and to the Court. The presumption is, that the Court which renders judgment, is competent to enforce it; and it is only in special cases, in which property cannot be found to satisfy it, that this Court interferes to discover and reach the property. But the legal remedy by execution must first be tried. This Court is not to know, by anticipation, that

it will be ineffectual. Upon such an allegation, it might assume the collection of all simple contract debts, in the first instance, without even requiring the creditor to prosecute his demand to judgment at law. It is sufficient, however, to observe, that I find the rule to have been long, and uniformly, established, that "to procure relief in equity by a bill brought to assist the execution of a judgment at law, the creditor must show, that he has proceeded at law to the extent necessary to give him a complete title." If he seeks aid as to real estate, he must show a judgment creating a lien upon such estate; if he seeks aid in respect to personal estate, he must show an execution giving him a legal preference or lien upon the chattels.

I have frequently alluded (*Wiggins v. Armstrong*, 2 Johns. Ch. Rep. 144. *Hendricks v. Robinson*, Id. 290.) to this rule; but I will once more refer to the cases in support of it, and to the distinction by which this case is attempted to be withdrawn from the general rule.

In *Angell v. Draper*, (1 Vern. 399.) the plaintiff had obtained judgment against S., and the defendant had got goods of the debtor into his hands sufficient to satisfy the debt due to him, and to leave "a great overplus." The bill was for discovery and account, and was dismissed upon demurrer, because the plaintiff had not actually sued out execution before he had brought his bill. In 1 P. Wms. 445. a case prior to that was referred to, in which Lord Nottingham had said, that a plaintiff must go as far as he could at law, by lodging a *fi. fa.* in the sheriff's hands, and getting *nulla bona* returned, and then he might file a bill to affect the personal estate. Again, in *Shirley v. Watts*, (3 Atk. 200.) a bill by a judgment creditor to redeem a mortgage of a leasehold estate, was dismissed, on the authority of *Angell v. Draper*, because the creditor had not sued out a *fi. fa.*, for, until then, he had "no lien on the leasehold estate." The case of *King v. Marissal* (3 Atk. 192. and cited also in 3 Atk. 200.) is, also, to the same point. A cre-

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ditor had obtained judgment and execution at law, and levied on leasehold property, which, with other effects, had been mortgaged after judgment and before execution. Lord *Hardwicke*, on the execution being produced, allowed the judgment creditor to redeem. In *Bunden v. Kennedy*, (3 *Atk.* 739.) an execution creditor was allowed to redeem a leasehold estate; and Lord *Ellenborough*, in *Scott v. Scholey*, (8 *East*, 467.) refers to some of these cases, to prove that "an execution creditor," as he terms him, may have a decree in equity for the sale of a mortgage term, in satisfaction of his rights. When Lord *Eldon*, in *Mountford v. Taylor*, (6 *Vesey*, 786.) seemed to admit that a judgment creditor might come here for the discovery of property, in order to make his judgment available, he spoke in reference to the case before him, in which the plaintiff had previously sued out an *elegit* and found nothing. Some of these latter cases are peculiarly forcible, since they require a previous execution at law, even in cases in which the creditor is pursuing a mere right in equity, not tangible at law, or vendible under a *fi. fa.*

There are some distinctions made in the books on this subject, but none that affect the authority of these decisions, in any essential point. Thus in *Manningham v. Bolingbroke*, in 1777, (if we may judge from the citation of it in *Mif. Tr.* p. 115. and *Cooper's Tr.* p. 149.) it was said, though an execution be necessary, yet the return of it, *nulla bona*, need not be shown. In the note in *Cooper*, this seems to be doubted, and the decision of Lord *Nottingham* is referred to; but it is quite uncertain what was the point decided. In *Raithby's* note to the case in *Vernon*, a different account of the decision is given, for he says that a demurrer to the bill, because no *elegit* had been sued out, was overruled. Until we have some correct report of the case, it is impossible to place any reliance upon it; and if an execution must be previously issued, before this Court can take cognizance of the

suit at law, for the purpose of helping it, the good sense of the thing would require a return of the execution, showing what had been done under it. In *Taylor v. Hill*, (1 Eq. Ca. Abr. 132. pl. 15.) before Lord King, in 1705, the bill was by a judgment creditor, *before execution*, for discovery of particular specified effects of his debtor in the hands of a third person, and it was allowed, upon demurrer. But the Chancellor said, it would not lie *against the debtor himself*, nor against a third person, to have a *general* discovery. So, in the modern case of *Leith v. Pope*, (*Dickens*, 575.) a judgment creditor filed a bill for the discovery of assets, under the idea that the debtor had made a voluntary assignment, and Lord *Thurlow* overruled a demurrer to the whole bill as "too large." It is to be observed, that this was a bill for a *discovery* of assets; and the marginal note to the case admits that an execution had been taken out, and so the case entirely concurs with all the prior decisions.

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The present case is not for discovery merely. It seeks the broadest relief. The plaintiffs, when they filed their bill, were only simple contract creditors of the defendants, upon a promissory note which they were prosecuting at law; and the only additional fact in the case now is, that since the filing of this bill, they have entered judgment at law upon their note. I presume there is no case in which relief was ever granted by this Court against the chattels of the debtor, upon such a state of facts.

Nor do I consider that the defendants have waived their objection by submitting to answer. They have given all the discovery sought, and the objection as to relief may be taken at the hearing. It is taken in this case, because the plaintiffs show no judgment and execution at law. The question is not as to a submission to the jurisdiction of the Court, but whether the plaintiffs, by their bill, have entitled themselves to the relief sought; and whether the admission of the fact, that they became judgment creditors in the inter-

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mediate time between the bill and the answer, gives them any better title to the relief.

I am of opinion it does not, and that the bill must consequently be dismissed, without costs, as to the defendants, *Browne, St. Smith, Culver, and West*, and with costs as to the defendant, *Huntington*. The aid of this Court cannot be necessary as to the real estate of the *Genesee Company*, because, it lies open for sale according to the course of the Courts of law. The creditor who has the prior judgment, has the legal preference, and the plaintiffs have their election either to buy in the prior judgments, or to purchase the real property under the execution upon the elder judgment, or consent to take the surplus that may arise on the sheriff's sale, after satisfying the incumbrances that have priority. This case affords no ground for an interference touching the real estate, since the legal remedies are plain and certain; and as to the claim against the defendants for a re-sale under the decree of this Court of the personal property purchased by the trustees, the plaintiffs fail from the want of showing themselves entitled to relief, as execution creditors, by an execution duly issued and levied, or returned, so as to have thereby acquired a legal preference to the chattel interests.

Decree.

The following decree was entered: "*It is declared, that nothing appears to impeach the consideration, or validity of the judgment in the pleadings mentioned, in favour of the defendant, H., nor his right and title to the proceeds of the personal estate of the Genesee Manufacturing Company, sold under his execution, and paid to him, nor his right and title to collect the residue of his judgment by the means provided by law; and that the Genesee Manufacturing Company, as well as other debtors, were authorized to give preferences among creditors, for a debt justly due. It is therefore ordered, &c. that the bill as to the defendant, H., be dismissed, with costs. And it is further declared, that the plaintiffs were not entitled, at the time of filing their bill, to question*



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in this Court, the dispositions of the real property of the said *Genesee Manufacturing Company*, nor are they now entitled to question the dispositions of their personal property, inasmuch, as at the time of filing their bill, they had not acquired a lien at law upon the real estate, as judgment creditors, nor have they, as yet, acquired, as execution creditors, a legal preference to the personal property, by means of an execution duly issued and levied or returned, nor shown that they cannot obtain satisfaction of their debt by having tried in vain the ordinary process of such execution at law. *And it is further declared*, that though the defendants, who are trustees of the said company, and purchased in the personal property of the company, under the execution of the defendant, *H.*, may be liable to have that property redeemed and resold, for the benefit of the creditors seeking the same, after deducting the price they gave, and the just expenses incurred thereon; yet, none but an execution creditor at law, is entitled to ask for such assistance from this Court, in respect to the personal estate. It is thereupon further ORDERED, &c. that the bill, as to all the other defendants who have answered, be dismissed without costs, and without prejudice to the right of the plaintiffs, to bring a new suit for the purpose aforesaid, in the proper character of judgment and execution creditors." (a)

(a) *Vide, Williams v. Brown*, the next case, and *M'Dermott v. Strong*, p. 687.

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*A. WILLIAMS against BROWN and others.*

A creditor, to entitle himself to the aid of this Court in the recovery of his debt, must show that he has prosecuted his debtor at law, to judgment and execution, so as to have gained a legal lien and preference, at the time of filing the bill, or at least before *issue joined* in this Court.

This Court, as well as a Court of law, allows a debtor to give a preference to one creditor over another. And where a debtor, in insolvent circumstances, confesses a judgment for a debt justly due, such judgment creditor will retain his priority.

If, however, the debtor, makes use of the judgment so confessed, to effect a sale or change of his property, for his own purposes, and the property is sold at a great sacrifice, and purchased in by the debtor, this Court will interfere, and either allow it to be redeemed, or put up again, at the price at which it was sold, and resold for the benefit of the other creditors, as to any surplus beyond that price.

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THE bill, filed in *May*, 1818, against the defendants named in the last cause, and *David Brown*, and *Francis Brown*, stated that the plaintiff held three promissory notes, dated *October 2*, 1816, given in the name of the *Genesee Manufacturing Company*, and signed by the defendant, *M. B.*, by order of the trustees, payable in one, two and three years from the dates, respectively, being for a balance due on a contract for erecting a building for the company, one of which notes was due in *October*, 1817, and remained unpaid, and a suit was commenced by the plaintiff against the company in *May*, 1816. The bill then stated the judgment confessed in favour of *Huntington*, and proceedings thereon, as in the last case, and alleged that the debt was contracted on the personal credit and responsibility of the defendants, trustees of the company; and that the judgment was confessed with a view to defraud the plaintiff, and other creditors of the company, &c. That in *May*, 1818, *Francis Brown & Co* of which firm the defendant *M. B.*, presi-

dent of the company, is a partner, sued the company at law, and that the trustees intend to confess a judgment, so as to give the said *B. & Co.*, a priority over the plaintiff and others; and that the debt claimed by them being 5,400 dollars, was for installments paid, and not a company debt, &c. *Prayer* for a discovery, and that the defendants may be enjoined from selling the real estate of the company under the *fi. fa.* in favour of *H.*, and that the pretended sale of the personal property might be vacated; and that *Francis Brown & Co.* might be enjoined from proceeding in their suit, and the trustees restrained from confessing judgment therein, and might be decreed to pay to the plaintiff, the debt due to him; and for general relief.

The defendants *M. B.*, *D. B.*, *F. B.*, *S. W.*, and *C.*, put in a joint and several answer. *M. B.* admitted that he had been the principal agent of the company since its incorporation, acting under the appointment and direction of the trustees; that he signed a confession of judgment in favour of *Francis Brown & Co.* on the 16th of May, 1818, for 5,341 dollars, 6 cents, on which an execution issued, which was stayed by the injunction. That no calls or installments, or payments thereon, constituted any part of the said debt. The answer further stated the manner in which the debt due *H.* was contracted, and the judgment and subsequent proceedings thereon. The defendant *H.*, also, put in his answer, stating the transaction relative to the purchase of the cotton of him, and the confession of the judgment by the trustees, &c.

The evidence taken in the cause related chiefly to the sale and purchase of the property of the company under the *fi. fa.* and it appeared from the proofs, that the plaintiff recovered a judgment by default, against the company, 8th January, 1819, on the first note, for 412 dollars and 31 cents.

The cause was this day brought to a hearing on the pleadings and proof.

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WILLIAMS  
v.  
BROWN.

Nov. 18th.

1820.

WILLIAMS

BROWN.

Dec. 24th.

*R. Sedgwick*, for the plaintiff.*Griffin*, for the defendant, *Huntington*.

The cause stood over for consideration to this day.

**THE CHANCELLOR.** The plaintiff files his bill as a simple contract creditor of the *Genesee Manufacturing Company*, to question the validity of the judgment confessed by the company to the defendant *Huntington*, and the sale of the personal estate under that judgment; to stay the suit of *Francis Brown & Co.* against the company, and to stay the company from confessing any judgment to *Francis Brown & Co.* and that his debt may be decreed to be paid.

This case falls within the decision just made in the suit of *Brinkerhoff v. Brown*, inasmuch as the plaintiff had not obtained judgment and execution at law, before he applied to this Court to assist him in this suit. It does, indeed, appear in proof, that since issue has been joined in the cause, the plaintiff, who continued the prosecution of his suit at law pending this bill, has obtained judgment upon one of his promissory notes. But if the judgment had been obtained in season before filing his bill, he would not have been in a condition to pursue the personal property which had been purchased in by two of the defendants who were trustees, upon the execution under *Huntington's* judgment, without showing that he had also taken out execution, and endeavoured to satisfy his debt under it. This point was so fully discussed in the case of *Brinkerhoff v. Brown*, that it is sufficient to refer to that decision. And if the plaintiff was now in a condition (and he is not, for the cause is to be determined upon the rights of the parties as they stood if not before, at least, when issue was joined) to question the validity of the judgment confessed in favour of *Huntington*, I should say he has entirely failed to impeach it. It was given for a debt justly due, founded upon a sale of cotton for the use of the company, and which was

purchased 'by' one of the trustees of the company, who was specially authorized to buy for the company, and under a promise by the trustees to be responsible, as trustees, as well as in their individual capacities. It is impossible to imagine a debt more justly due from the company; and they had a right to give a preference and to confess judgment to such a creditor. If the execution under that judgment was abused by the trustees in the sale and purchase by them of the corporate property, they are responsible for that abuse, not the creditor who had no knowledge of it. Such conduct had no retrospective effect upon the validity of the judgment; and *Huntington* was clearly entitled to retain the proceeds of the execution which has been paid to him.

Courts of equity, as well as Courts of law, allow a debtor to give a preference to one creditor over another. In *Small v. Oudley*, (2 P. Wms. 427.) a debtor in insolvent circumstances, assigned personal property to a particular creditor to secure his debt; and this was done without his privacy or knowledge; but as it was for a just debt, the Master of the Rolls gave effect to the assignment. Other cases to the same point were referred to in *Hendricks v. Robinson*; (2 Johns. Ch. Rep. 308.) and unless we were to overturn a series of authorities, we could not question the right of the debtor to confess a judgment in favour of a particular creditor, for an honest debt then due, and that such judgment will hold its priority. We have, indeed, often occasion to observe, with regret, that the race of legal diligence between creditors, and the right of the debtor to pay, or secure one creditor in preference to another, gives occasion to the most unequal distribution of an insolvent's estate; but in cases not provided for by statute, the proceeding cannot ordinarily be controlled. This Court does secure an equitable distribution of the real and personal assets of the deceased debtor, upon the terms, and under the limita-

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\* *Ante*, p. 619.

tions explained at large in the late case of *Thompson v. Brown and others*.\* But the doctrine in that case does not apply to the estates of debtors in full life, for there is no equitable trust created and attached to the distribution of the effects in the latter case.

There are *items* that went to constitute a considerable part of the judgment confessed by the trustees in favour of *Francis Brown & Company*, that may well give ground for discussion, at the instance of creditors; and if the plaintiff had come here as a judgment creditor, he would have been entitled to have opened an inquiry into the consideration of that judgment. But I cannot admit him to that inquiry upon a bill filed by him as a simple contract debtor, merely because he puts in, as an *exhibit*, in the mass of proof, the record of a judgment at law obtained since the pleadings were closed. The cause must be decided upon the allegations in the pleadings, and the proofs in relation to them. Whether the prior, and still unsatisfied judgment of *Huntington*, and (if we may allude to a fact in the preceding cause) the prior judgment of *Brinkerhoff*, would render such an inquiry expedient on the part of this plaintiff, it is not for me to say. He was premature with his bill in this suit, for such a purpose, and for the reason assigned in *Wiggins v. Armstrong*. (2 *Johns. Ch. Rep.* 144.)

All I can say is, that when a plaintiff shall appear with a proper title to such relief, I should be strongly inclined, upon a case like this, to institute an inquiry, by reference, into the charges constituting the consideration of the judgment confessed by the company to *F. Brown and others*; and also to give to the execution creditor who might apply, a remedy against the personal property purchased in by the trustees, by allowing it to be redeemed, and by having it re-sold for the benefit of such creditor, as to any surplus price beyond what the trustees bid and paid.

I shall, therefore, dismiss this bill as against the defend-

ant *Huntington*, with costs, but without costs, and without prejudice, as against the other defendants.

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*M'DERMOTT*  
v.  
*STRONG.*

Decree accordingly. (a)

(a) Vide *Brinkerhoff v. Brown*, ante, p. 671. and *M'Dermott v. Strong*, post.

**M'DERMOTT and others against STRONG and others.**

This Court has power to assist a judgment creditor to discover and reach the property of a debtor, which is beyond the reach of an execution at law. To get possession of the equitable interest of a debtor, as a resulting trust in goods and chattels, the judgment creditor must come into this Court.

But, before a judgment creditor can be entitled to the aid of the Court, against the goods and chattels of his debtor, or against any equitable interest of such debtor in them, he must first have taken out execution at law, and caused it to be levied or returned, so as thereby to show a failure of his remedy at law.

A judgment creditor who so takes out execution at law, but is unable to reach a residuary trust interest in the chattels of his debtor, and files his bill for the aid of this Court, gains, by his execution and legal diligence, a legal preference to the assistance of this Court, on a lien on the equitable interest, which cannot be affected or impaired by any subsequent assignment of that equity by the debtor, either for the benefit of all his creditors generally, as under the insolvent act, or for the benefit of a particular creditor.

And although it is the favourite policy of this Court to distribute the assets among all the creditors, *pari passu*, yet when such a judicial preference has been established by the superior legal diligence of any creditor, that preference will be observed in the distribution of the assets.

SUPPLEMENTAL bill, filed September 2, 1819, against the defendants, as assignees of *James Robertson*, an insolvent debtor, setting forth the original bill of discovery, filed February 2d, 1809, against *Robertson, White Mat-*

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lack, and Robert C. Allyn, and their answers. The plaintiffs were judgment creditors of Robertson, and their several judgments were entered up from the 6th to the 21st of May, 1808, and executions were issued thereon to the sheriff of the city and county of New-York, who levied on the ship *Cincinnati* and three other ships, as the property of R., and returned that he could not raise the money thereon, as the ships were claimed by virtue of bills of sale and assignments from R.

The defendants put in their answer to the supplemental bill, October 30, 1819; and a replication was filed, and proofs taken in the cause. The material facts appearing from the pleadings and proofs are sufficiently stated in the opinion delivered by the Court.

Nov. 15th.

The cause was, this day, brought to a hearing.

S. Jones, for the plaintiffs. He cited 2 Bl. Comm. 406. Perkins, sec. 55. 8 Johns. Rep. 385. 9 Johns. Rep. 73. 1 Vernon, 398, 399. 1 Pr. Wms. 444. 2 Atk. 477. 3 Atk. 200. 739. Ambler, 79. 1 Maddock's Equ. Pr. 418. 2 Johns. Ch. Rep. 283. 296. 312.

Wells, contra. He cited 5 Johns. Rep. 335. 386. 2 Johns. Ch. Rep. 283.

Dec. 29th.

The cause stood over for consideration until this day.

THE CHANCELLOR. The statement of a few facts will sufficiently bring up to view a very important question arising, and discussed in this case.

James Robertson, on the 27th of April, 1808, assigned to White Matlack, jun. the ship *Cincinnati*, upon trust, to sell her and, out of the proceeds, to discharge certain debts and engagements of Robertson, and to account for the surplus to Robertson, himself, or to his assignees, if any should in the



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mean time, be appointed under the insolvent act. *M.* afterwards transferred his trust to *Allyn*, and the ship was sold by *Allyn*, with the consent of the plaintiffs, on the 9th of *March*, 1809, and the surplus proceeds, amounting to 5,400 dollars, after satisfying the trusts, were secured by a note, dated 9th *March*, 1809, payable in six months, taken in part payment of the ship. The note was deposited with the defendants, as stakeholders, by *Allyn*, with the approbation of the plaintiffs, in trust to receive the money when due, and hold it subject to the order of this Court, in the original suit then pending, and of which the defendants then had notice. The deposit of the note, by this arrangement, was on the 30th *March*, 1809; and in *June* following, *Robertson* was discharged under the insolvent act, and the defendants were appointed his assignees. The note was paid to the defendants when it fell due, and they now set up a right to distribute the money, as assignees of *Robertson*, rateably among all his creditors. The plaintiffs, on the other hand, claim it as judgment and execution creditors at law, entitled to a preference over the general creditors.

The plaintiffs severally obtained judgments at law against *Robertson*, in *May*, 1808; and in *May* and *June*, 1808, they severally issued executions against the estate of *Robertson*, which were levied on the ship, as far forth as such a levy could be made consistent with the prior assignment. Early in *July*, 1808, the plaintiffs gave notice to *Allyn* of their judgments, executions and levy, and that they should look to him for the surplus, after satisfying the valid trusts which had priority to the lien of their executions.

The question, then, is, have the plaintiffs, as execution creditors at law, a priority of right over the creditors at large, to these surplus proceeds, being the 5,400 dollars so received by the defendants when the note fell due, in *September*, 1809?

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Knows.

The surplus, after satisfying the objects of the assignment, (and which are assumed in this case to have been fair and valid,) belonged, as a resulting trust, to *Robertson*. They could not have belonged to any other person, for the assignees were not created, until after the sale of the ship, the liquidation of the surplus, and the deposit of the same with the defendants. Nor was this resulting trust the subject of seizure and sale at law. It was a mere equity, and could only be reached by the aid of this Court. This was decided in *Wilkes and Pontaine v. Ferris*, (5 Johns. Rep. 386,) and the same doctrine was declared by the K. B. in *Scott v. Scholey*. (8 Eng. 467.) A judgment creditor must go into equity to obtain possession of the equitable interest of his debtor; and if he has taken and exhausted all the means in his power at law, he will be entitled to the aid of this Court to discover and apply the property to satisfy his execution. In *Bayard v. Hoffman*,\* the cases were examined touching the power of this Court to enable a creditor to reach trust property beyond the reach of an execution at law, and it concluded, that the Court had, and ought to have, this power. But this case stands on stronger ground than if it rested merely on the general jurisdiction of this Court upon residuary trust interests in chattels, for the plaintiffs come in the character of execution creditors, and have thereby acquired, by means of their executions at law, what this Court regards as a legal preference, or lien on the property so placed in trust.

Ante, p. 460.

Ante, p. 671.

The cases on this point were all recently reviewed in *Brinckerhoff v. Brown*,† and it would be useless to notice them again. The case of *Hendricks v. Robinson*, (2 Johns. Ch. Rep. 283.) does not interfere with the question whether an execution creditor at law might not acquire a right, to be recognized and enforced in this Court, to the surplus, or resulting trust, belonging to the debtor, after the purposes of the prior assignment of the chattel interest had been answered. In that case, there was no surplus in the hands of

*Minerva & Champlin.* The great point there was, whether the assignment to them, was valid or fraudulent, and whether the plaintiffs could divert the proceeds of the property assigned, from the fair and lawful trusts created by the assignments, which were made before the plaintiff had even commenced his suit at law. I regard the law to be clearly settled, that before a judgment creditor can come here for aid against the goods and chattels of his debtor, or against any equitable interest which he may have therein, he must first take out execution, and cause it to be levied or returned, so as to show thereby, that his remedy at law fails, and that he has, also, acquired, by that act of diligence, a legal preference to the debtor's interest.

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The surplus of the debtor's interest, in the present case, remained undisposed of by the debtor to whom it related, when the plaintiffs filed their bill in this Court. If they had a right to it as judgment creditors, by having sued out execution at law, and having filed their bill before any other judgment creditors had done either, that right could not be affected by a subsequent assignment of that equity by the debtor. And whether that subsequent assignment was for the benefit of the creditors in general, as it was in this case, or for the benefit of some individual creditor, cannot alter the application of the principle. It was not in the power of the debtor to withdraw that surplus from the lien so acquired, in the view of this Court, by the execution. Admitting that the plaintiffs had acquired, by their executions at law, a legal preference to the assistance of this Court, (and none but execution creditors at law are entitled to that assistance,) that preference ought not, in justice, to be taken away. Though it be the favourite policy of this Court to distribute assets equally among creditors, *pari passu*, yet, whenever a judicial preference has been established, by the superior legal diligence of any creditor, that preference is always preserved in the distribution of assets by this Court. This point appeared most abundantly in the course of the discus-

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Ante, p. 619.

sion on the authorities in the late case of *Thompson v. Brown and others*.\* If the plaintiffs, instead of seeking merely the surplus proceeds of the ship, had charged the assignment to have been fraudulent, and had obtained a decree, setting it aside as void, it cannot be doubted but that their executions, after the impediment of the assignment was removed, would have held the whole subject assigned, in preference to other creditors who had no such executions. Instead of seeking to recover the whole value of the ship, they content themselves, in this case, with asking the aid of this Court for the surplus resitting to their debtor; and no good reason appears why their legal priority or lien should not be as available for a part, as for the whole.

It may be laid down as a rule of equity, that an execution creditor at law has a right to come here and redeem an incumbrance upon a chattel interest, in like manner as a judgment creditor at law is entitled to redeem an incumbrance upon the real estate; and the party so redeeming will be entitled, in either case, to a preference, according to his legal priority. The plaintiffs, in this case, had acquired that right of redemption when the ship *Cincinnati* was sold, by agreement, without prejudice to their rights; and instead of seeking to redeem, they are equally entitled to come here and claim the surplus.

I shall accordingly, decree, that the defendants pay to the plaintiffs the 5,400 dollars, so received by them in trust, in September, 1809; and that it be referred to a master to inquire and report what disposition was made, of that money by the defendants, and whether it was kept in bank by itself, or was mingled with their own moneys, and employed in like manner; that he compute interest on that sum, from the time it was paid to the defendants, up to the date of his report, reserving, however, the question of interest, until the coming in of the report; and that the said moneys to be paid by the defendants, if not sufficient to satisfy the judgments of the plaintiffs, with interest on those judgments,

for the real sum recovered and due, including their costs of those judgments and of this suit, be paid to all of them rateably, in proportion to the amount due to each of them respectively, as aforesaid; and that the money be paid to the solicitor for the plaintiffs, for the purpose of such distribution.

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Decree accordingly.(a)

(a) Vide *Brinkerhoff v. Brown*, ante, 671. and *Williams v. Brown*, ante, 682.

R. K. ALLEN and THORP *against* RANDOLPH and others.

A *plea* must be perfect in itself, so that if true in fact, it will put an end to the cause.

If circumstances of fraud are charged in the bill, they must be denied by a general averment, at least.

Where the bill charged misrepresentation, coercion, and fraud, in procuring a release of a debt, and the defendant put in a plea and answer; and in his plea, insisted on the release in bar, without noticing the allegation of fraud, though in the *answer* it was fully answered and denied, the plea was held bad.

Where A. assigned and made over to S. a debt and demand against R., and the proceeds of goods delivered by A. to R. to sell on account: Held, that all the right and interest of A., as the creditor of R., passed by the assignment, and that a release of all demands in law and equity by S. to R., as assignee, given on a compromise with him, was valid and effectual.

THE bill stated, among other things, that the plaintiff *Dec. 28th.* and D. K. Allen, were partners in trade, under the firm of R. & D. K. Allen, and became insolvent on the 16th of April, 1818. That D. K. A., being arrested and imprisoned, applied for his discharge under the 9th section of the insolvent act, and having assigned his estate to the plaintiff, Thorp, according to the act, was, on the 16th of December, 1818, discharged from his debts. That before their failure, R. & D. K. Allen, delivered to the defendants, Randolph &

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*Savage*, various parcels of goods, at various times, to be shipped to different places, and sold for their account, all of which were particularly stated in the bill, and amounting to above 30,000 dollars; and the bill charged, that the defendants, *R. & S.*, had never accounted for the proceeds of the goods or moneys received by them, to *R. & D. K. A.*, before the assignment and discharge of *D. K. A.*, nor to the plaintiffs, *A. and T.*, since. That before their failure *R. & D. K. A.*, being indebted to the defendant *S.*, by bond, for 9,964 dollars, and to *D. A.* for moneys lent to them, the said *D. A.* being also responsible for a demand of one *F. A. T.* against them, for 10,000 dollars, they, on the 13th of May, 1818, assigned to the defendant, *Skidmore*, among other things, the debt or demand of the said *R. & D. K. A.* against the defendants, *Randolph & Savage*, and the proceeds of the goods so delivered to them as aforesaid, in trust to recover and collect the same, and by means thereof, to pay the moneys due to him, the said *Skidmore*, and to *David A.*, &c. and to indemnify *David A.*, &c. and to pay the residue or surplus to *R. & D. K. A.*, their executors, administrators or assigns.

The bill stated, that *Randolph & Savage* refused to account to *Skidmore*, and being pressed by him for payment, offered to pay 2,000 dollars on account of the demand, and give their notes for 2,000 dollars more, if *S.* would discharge them; and that if *S.* would not accept that offer, they would not pay any thing. That *Skidmore*, apprehensive of the insolvency of *R. & S.*, thought it prudent to accept the offer; and on the 7th of April, 1819, *R. & S.* accordingly, paid the 2,000 dollars, and gave three notes, payable in 30, 60, and 90 days, for the other 2,000 dollars. The first and second notes were paid, but *R. & S.* failed before the third fell due, and compounded with all, or most of their creditors. That before the money and notes were delivered, *Skidmore*, as assignee, &c. executed a discharge or release, to *Randolph & Savage*, and delivered to them the book of

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account kept by *R. & D. K. A.* of all the goods, &c. which release, &c. was insisted on by *R. & S.* as a condition precedent to their paying the 4,000 dollars. The bill charged, that this discharge and release were obtained by the defendants *R. & S.* from *Skidmore*, by misrepresentation, coercion and fraud; that they could not avail themselves of it; and that *Skidmore* had no authority or power to give it, except upon a fair and full settlement of the account with *R. & S.*, &c. *Prayer*, that the defendants, *R. & S.*, may be decreed to come to an account with the plaintiffs, for the goods so delivered to them, or for the proceeds thereof, and to pay to the plaintiffs what should be found due to them, and that the defendant, *Skidmore*, account for the moneys he has received, and for general relief.

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The defendants, *Randolph & Savage*, put in their *plea* and *answer*, on the 15th of *September*, 1820. They pleaded, after protesting, &c. that before the filing of the bill, &c. to wit, on the 7th of *April*, 1819, *Skidmore*, as assignee, &c. by his deed of release, in consideration of 4,000 dollars, released and discharged them from all demands in law or equity, by means of the said assignment, and prayed judgment, &c. The plea was silent as to the allegations of misrepresentation and fraud, but the same were fully denied and repelled in the answer.

*T. A. Emmet* and *M. C. C. C.*, for the defendants, in support of the *plea* and answer.

*J. Radcliff*, contra.

THE CHANCELLOR. The first objection to the plea is, that *Skidmore*, the assignee of *R. & D. K. Allen*, had no authority to compromise or compound with the defendants *Randolph & Savage*, as to the demand assigned to him. I do not perceive the force of this objection. *Skidmore* was not a mere agent to collect the debt of the *Allens*. The

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bill states that they did, by an assignment delivered to Skidmore, "assign and make over to him their debt or demand in the bill stated, against R. & S., and the proceeds of the goods delivered." This deed or writing passed their right and interest as creditors of R. & S.; and the debtors had a right to treat with Skidmore, and deal with him as the real owner. The trusts raised by the assignment applied to the debt or proceeds which should come into his hands, and R. & S. had no concern with those trusts. They could not safely deal with any other person than the assignee of the demand; any settlement they might make with him, if made in good faith, and not by fraud or collusion with him, was valid and binding. The release or discharge given by the assignee, upon the settlement, was one that he was competent to give, and they to receive. It discharged them from "all demands in law and equity by means of the assignment." It was, therefore, co-extensive with the debt and demand which passed by the assignment.

The only real difficulty in this case is, that there is no general averment in the plea denying the charges in the bill, which, if true, would avoid the plea. The bill charges that the release was procured by misrepresentation, coercion, and fraud, and though this charge is denied in the answer accompanying the plea, there is not even a general averment to that effect in the plea. The release is pleaded nakedly, as was the award in the two Exchequer cases of *Pope v. Bish* and *Edmundson v. Heartly*. (1 *Ans.* 59. 97.) But in the latter of those cases, the Court said, they did not mean to extend the authority of them beyond the case of awards. In *Lloyd v. Smith*, (1 *Ans.* 258.) afterwards, in the same Court, such a naked plea of a release charged by the bill to have been procured by fraud, was not allowed, in the first instance, but reserved to the hearing. In *Bayley v. Adams*, (6 *Vesey*, 586.) the authority of those cases was very much shaken; and it seemed to be considered by Lord Eldon as the better rule, that



the charges in the bill must be met by way of general averment in the plea, as well as particularly in the answer. The rule is so laid down in *Misf. Tr.* 218. ; and the decision in *Davie v. Chester*, in Chancery, in 1780, is referred to, as containing a decision directly to the point. The sense of the rule is, that a plea must be perfect in itself, so that, if true in point of fact, there may be an end of the cause. But if the circumstances of fraud under which the release is charged to have been procured, be not denied in the plea, it may be true that such a release was given, and yet this may be of no effect.

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I shall, therefore, as was done in the Exchequer cases, and as Lord *Eldon* consented to in *Bayley v. Adams*, allow the defendant to amend his plea ; the amendment to be by inserting a general averment or denial of the facts charged in the bill, which go to show that the release was fraudulently or improperly procured. The amendment to be made in three weeks after service of a copy of this rule, and a copy served *gratis* on the solicitor for the plaintiff ; and in default thereof, the plea to be deemed overruled, and with liberty to the plaintiffs to except to the answer of the defendant, *Randolph*, the survivor of *R. & S.*

As the cause was brought to a hearing, not only on the defect in the plea, but on the merits of the defence touching the competency of *Skidmore* to execute a release, I shall not grant costs upon this order, but reserve the question of costs to the conclusion of the cause.

Decree accordingly.

END OF THE CASES.

## ORDER OF COURT.

*June 21st, 1820.*

“ ORDERED, That the stated terms of this Court shall hereafter be held on the fourth *Mondays* of *May* and *October*, in the city of *New-York*; and on the fourth *Mondays* of *March* and *August*, in the city of *Albany*; and that the 86th rule of this Court be, and the same is, hereby repealed; and that the term of *March* be substituted for the term of *January*, mentioned in the 80th rule.”

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### ADMINISTRATOR.

*Vide* EXECUTOR AND ADMINISTRATOR.

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### AGREEMENT.

- I. *Construction, effect, waiver, and rescinding of an agreement.*
- II. *Specific performance.*
- I. *Construction, effect, waiver, and rescinding of an agreement.*
1. An agreement for a lease pre-

sumed, from length of time, and possession and payment of rent by the tenant; and the landlord decreed, accordingly, to execute a lease in fee to the tenant, with the usual covenants contained in such leases of the lands in the same tract or manor. *Ham v. Schuyler*, 1

2. Equity will not force a mere voluntary agreement, not valid at law, especially against a legal claim for a just debt, and where there is no consideration, accident, or fraud. *Min- turn v. Seymour*, 497

### II. *Specific performance.*

3. On a contract for the sale of land, the payment of the purchase money by the plaintiff, was made a condition precedent to the conveyance; and after a default the defendant accepted part of the purchase money; but the plaintiff, though repeatedly called upon, refused to complete the payment. The defendant, after giving notice of his intention to do so, sold and conveyed the land to another; and the plaintiff, afterwards, tendered the money due on the contract, and filed his bill for a

specific performance of the contract: *Held*, that a specific performance could not be decreed; nor could the bill be sustained for a compensation in damages. *Hatch v. Cobb*, 559

4. It seems, that even if the defendant had not sold the land to another, before the plaintiff filed his bill, he would not, after such default and delay, on his part, be entitled to a specific performance, as no accident, mistake, or fraud, had intervened, to prevent the performance on his part. *ib.*

*Vide* LACHES, LENGTH OF TIME AND POSSESSION, 1. 4. 5. INJUNCTION, 1. 4. III. 9. FRAUD, 3. AWARD. BAILMENT. DIVORCE, 5. JURISDICTION, 11.

#### ALIMONY.

*Vide* DIVORCE, 2.

#### AMENDMENT.

*Vide* PRACTICE, V.

#### ANSWER.

*Vide* PLAEDING, VI.

#### APPEARANCE.

*Vide* PRACTICE, VI.

#### ASSESSMENTS.

*Vide* JURISDICTION, 5, 6.

#### ASSETS.

1. A devise of all a creditor's estate real and personal, in trust, to pay debts and to distribute the residue, places the assets under the jurisdiction of this Court. *Benson v. Le Roy*. 651

2. The statute, *sess.* 36. *ch.* 93. (1 *N. R. L.* 316.) does not interfere with the doctrine of equitable assets, by which all the creditors are to be paid *pari passu*; for the omission of the 4th section, or proviso of the *English* statute, (3 *W. & M.* c. 14.) which excepted devises of lands for the payment of debts, does not vary the construction. *ib.*

*Vide* EXECUTOR AND ADMINISTRATOR, 3. 5, 6, 7, 8, 9, 10, 11, 12. 14, 15. JURISDICTION, 15, 16. 30.

#### ASSIGNMENT.

Where *A.* assigned and made over to *S.* a debt and demand against *R.* and also the proceeds of goods delivered by *A.* to *R.* to sell on account: *Held*, that all the right and interest of *A.*, as creditor of *R.*, passed by the assignment; and that a release of all demands in law and equity by *S.* to *R.*, as assignee, given on a compromise with him, was valid and effectual. *Allen v. Randolph*. 693

*Vide* INSOLVENT DEBTOR, 1, 2. DEBTOR AND CREDITOR, 3, 4, 5. SHIP OWNERS, 1, 2. PARTNERSHIP, 3, 4, 5. BANKRUPT, 6. FOREIGN LAWS, 1, 2, 4, 5. FRAUDULENT CONVEYANCES, 3.

#### ATTACHMENT.

*Vide* PRACTICE, I. 1, 2, 3.

#### AUCTION.

*Vide* FRAUDULENT CONVEYANCES, 5, 6. VENDOR AND PURCHASER, 3. 5, 6.

**AWARD.**

1. This Court will correct a *mis-*  
*take* of an extrajudicial nature,  
in an award of arbitrators, and  
decree a performance of it *in*  
*specie*. *Bouk v. Wilber*, 405
2. As where the subject of contro-  
versy was land which the ar-  
bitrators were to appraise, and  
the plaintiff was to convey the  
same to the defendant who was  
to pay the amount of the ap-  
praisement, and the arbitrators,  
by a mere clerical mistake, so  
erroneously described the land  
in the award, as to include *one*  
acre only, instead of fifty acres,  
it was decreed that the award be  
corrected according to the truth  
of the fact; and that there be  
a specific performance of it  
accordingly. *ib.*

**B.**

**BAILMENT.**

The defendants, being stock and ex-  
change brokers, in the course  
of their business, received of  
the plaintiff 430 shares of *Uni-*  
*ted States* bank stock, and which,  
it was agreed, in *February*, 1818,  
that they should hold as col-  
lateral security for the pay-  
ment of a note given to them by  
the plaintiff, for monies advan-  
ced to him, and payable on the  
20th *January*, 1819; and that  
they should be at liberty, in  
case the note was not paid, at  
the time, to make immediate  
sale of the stock, accounting to  
the plaintiff, for any surplus,  
and holding him responsible for  
any deficiency: *Held*, that as  
the defendants, at all times,  
since the giving of the note by

the plaintiff, were possessed of  
shares standing in their names,  
and under their absolute and  
rightful control, and subject to  
no contract, to an amount far  
exceeding the number of shares  
deposited with them by the  
plaintiff, (and which were not  
marked or identified as his par-  
ticular property but blended  
with the mass of shares of the  
same stock held and owned by  
the defendants) and were ready  
and able, at any time, to trans-  
fer the 430 shares to the plain-  
tiff, on payment of the note,  
they were not bound to ac-  
count to the plaintiff for his  
stock, at the *highest price* at  
which shares were sold by them,  
at any time during that period;  
but that the like number of  
shares held by the defendants  
when the note became due,  
were to be considered as the  
shares so deposited by the  
plaintiff; and which the defen-  
dants were at liberty to sell,  
according to the agreement, to  
reimburse the amount of the  
note which remained unpaid.  
*Nourse v. Prime*, 490

**BANKRUPT.**

1. It is a principle of international  
law, to take notice of and give  
effect to the title of foreign as-  
signees; and assignees of a fo-  
reign bankrupt may sue here  
for debts due to the bankrupt's  
estate, either as such assignees,  
or in the name of the bankrupt.  
*Holmes v. Remsen*, 460
2. The same principle of general  
law, that governs marriage  
contracts, testamentary disposi-  
tions, and the succession to the  
personal estate of an intestate,

- applies to the distribution of the estate of a foreign bankrupt. 460
3. The principle of international law on this subject, is a rule of decision, not a question of jurisdiction ; and does not affect the rights of territorial sovereignty. *ib.*
  4. But the title of the foreign assignees takes effect only from the date of the assignment to them, and has no relation to the time of the bankruptcy committed. *ib.*
  5. For the doctrine of *relation*, in regard to bankrupts, is a positive rule of mere municipal policy ; and the rule of *comity* between nations does not require its adoption. *ib.*
  6. Therefore, an assignment by the commissioners of bankrupts, in *England*, of all the estate and *choses in action* of the bankrupt, passes a *debt* due by a citizen of this state to the *English* bankrupt. *ib.*
  7. And if such assignment is prior in time to an attachment of the same debt here, at the instance of an *American* creditor of the bankrupt, issued under the act for relief against absent debtors, &c. a subsequent payment of the debt to the foreign assignees in *England*, is a bar to a suit brought here by the *trustees* under the act, against the debtors here. *ib.*
  8. A concurrent separate assignment made by the foreign bankrupt to the same assignees, on the same trusts, though it may strengthen the case before the Court, makes no difference in the application of the general doctrine. *ib.*
  9. The effect is the same whether

the transfer is made by himself, or by the law of the place of his domicile, for him. 460

## BARON AND FEME.

1. This Court will lay hold of the property of a wife, which may be within its power, for the purpose of providing a maintenance for her, when she is abandoned by her husband, or prevented by his ill treatment from cohabiting with him. *Dumond v. Magee*, 318
2. Where a husband abandoned his wife, and married another woman, with whom he continued to live, for twenty years, he was held to have forfeited all just claim to his wife's distributive share to personal estate inherited by her. *ib.*
3. And the Court directed the principal of the wife's share to be brought into Court, and placed at interest ; and, after her death, the principal to go to her children, by her lawful husband, or to their representatives : she having, after being abandoned by her husband, upon report and belief of his death, married another. *ib.*

## *Vide* DIVORCE.

## BILL.

## *Vide* PLEADINGS, III.

## BOND.

The penalty of a bond cannot be made to cover any other debt or demand than that mentioned in the condition. *Troup v. Wood and Sherwood*, 228

**C.**

**CIVILITER MORTUUS.**

**A** person convicted of felony, and sentenced to imprisonment in the state prison for life, is *civiliter mortuus*. *Troup v. Wood and Sherwood*, 228

**COLLATERAL SECURITY.**

*Vide* MORTGAGE, II. 6.

**CONSTITUTION OF THE UNITED STATES.**

1. Under the Constitution of the United States, citizens of each state are entitled to free ingress and egress to and from any other state, and to all the immunities of citizens in every state. *Livingston v. Tompkins*, 430
2. The government of the United States having sole and exclusive jurisdiction over all differences between two or more states, all acts of reprisal between the states are unnecessary and unlawful. *ib.*

**CONSTITUTION OF NEW-YORK.**

*Vide* STEAM BOATS, 1.

**CONTEMPT.**

*Vide* PRACTICE, I. XIII. 48, 49.

**CONTRACT.**

*Vide* AGREEMENT.

**CONTRIBUTION.**

1. The doctrine of contribution is not so much founded on contract, as on the principle of

equity and justice, that where the interest is common, the burden also should be common; and the principle, that equality of right requires equality of burden, has a more extensive and effectual operation in a court of equity, than in a court of law. *Campbell v. Messier*, 334

2. Thus, where there was an old party wall between two owners of houses, in the city of New-York, and one of them being desirous to build a new house on his lot, pulled down his old house, and with it the party wall, which was ruinous, and rebuilt it with his new house, the owner of the contiguous house and lot is bound to contribute rateably to the cost of the new party wall. *ib.*
3. He is not, however, bound to contribute to building the new wall higher than the old; nor, if materials more costly, or of a different nature, are used in it, is he bound to pay any part of the extra expense. *ib.*
4. Where, in a bill filed by a mortgagor, to redeem, against the administrators of a mortgagee in possession, and others claiming under him, the defendants were decreed to pay a certain sum for the *rents and profits* of the land, after deducting the mortgage debt; and the decree being silent as to the proportion which each defendant was to pay, one of the defendants paid the whole, and the plaintiff gave him liberty to make use of the decree to reimburse himself: *Held*, that he could use the decree only for his protection and indemnity, so far as his co-defendants were bound to contribute. *Scribner v. Hickok and others*, 530

5. And the court, on petition and motion of a co-defendant, directed the contribution to be enforced under the decree, so far only as the right was clearly ascertained. *ib.*
6. A defendant who has made payments for his co-defendant towards satisfying a prior mortgage, and beyond his proportion of the burden, is to be deemed substituted for the plaintiff, to that extent, and as far as the fact appears from the proceedings in the cause. *Lawrence v. Cornell,* 545

*Vide DOWER, 3.*

### CORPORATIONS.

1. A foreign corporation, or an incorporated bank of another state, may sue in their corporate name, and file a bill for the sale of land in this state, under a mortgage taken to secure money lent. *Silver Lake Bank v. North,* 370
2. If the loan and the mortgage were concurrent acts, it is within the reason and spirit of the act of incorporation by which the corporation is authorized to take mortgages, &c. for the security of debts previously contracted. *ib.*
3. But it seems, that this court will not, in a collateral way, decide a question of *misuser* of a charter, by setting aside a *bona fide* contract. *ib.*
4. If an incorporated bank of another state lends money, and takes a mortgage in this state, it is not a violation of the act of the legislature of this state, passed April 21, 1818, relative to banks, &c. (*sess. 36. ch. 71.*) for restraining unincorporated associations from carrying on banking business. *ib.*
5. In private unincorporated associations of individuals, the majority cannot bind the minority, unless by special agreement. *Livingston v. Lynch,* 573

### COSTS.

1. A defendant who answered an original bill, after a decree against him, petitioned for a *re-hearing*, which was granted, and the plaintiffs filed a bill of *revivor and supplement*, to which the defendant answered and disclaimed; he was held not to be entitled to costs, on the dismissal of the bill. *Shaver v. Radley,* 310
2. On the dismissal of the bill costs were denied to the defendants, on the ground of *laches* on their part, and hardship on the part of the plaintiffs. *ib.*
3. Where the defendant set up a judgment and a mortgage, which judgment was proved to have been satisfied, and claimed more than was due on the mortgage, he was held not to be entitled to costs against the plaintiff. *Brinkerhoff v. Lansing,* 65, 79
4. And the plaintiff, though he succeeded in disproving the claim of the defendant, but failed in supporting his charge that the mortgage was also satisfied, and fraudulently kept on foot, was held not entitled to costs. *ib.*
5. A defendant who had no interest in the controversy, and was not a necessary party, but united with the other defendants in setting up a defence which was not true, was held not entitled to costs; though they would have been otherwise allowed to him. *ib.*



6. Costs not allowed to either party, on a bill for a perpetual injunction to quiet the possession. *De Riemer v. Cantillon*, 86. 93
7. Costs awarded on a decree correcting a mistake in a contract, in a bill for that purpose, and for specific performance. *Keiselbrack v. Livingston*, 144
8. On a bill for discovery merely, the defendant is entitled to costs. *Burnet v. Sanders*, 503
9. But where the plaintiff, who is entitled to discovery, goes first to the defendant, and asks for the information sought, which, though in the power of the defendant to give, is refused; and the plaintiff is, therefore, compelled to file a bill against the defendant, to obtain the discovery, and he answers fully, he will not be entitled to costs. *ib.*
10. Where a plaintiff asked for further time to except to the answer, which was granted; and, also, for leave to amend his bill after such answer, and after a plea accompanying it, but not noticed for argument; the plaintiff, on being allowed to amend his bill, was ordered to pay *five dollars*, for the *extra* costs of the further answer, and the *taxable* costs of the plea, in case it should become useless, in consequence of the bill being amended. *French v. Shotwell*, 505
11. Where the will of the testator is so ambiguously expressed, as to render it proper for the executor to take the direction of the court, the costs will be ordered to be paid out of the fund in controversy. *Rogers v. Ross*, 608

*Vide* DOWER, 4. IDIOTS AND LUNATICS, 1, 2.

## CREDITOR.

*Vide* DEBTOR AND CREDITOR.

## D.

## DEBTOR AND CREDITOR.

1. If one judgment creditor has a right to go upon two funds, and a second judgment creditor upon one of them, belonging to the same debtor, the former may be compelled to apply first to the fund not reached by the second judgment, so that both judgments may be satisfied. *Dorr v. Shaw*, 17
2. But if the first creditor has a judgment against A. and B., and the second creditor against B. only, the latter cannot compel the former to take the land of A. only; it not appearing whether A. or B. ought to pay the debt due to the first creditor; nor any equitable right shown in B. to have the debt charged on A. alone. *ib.*
3. An assignment by a debtor of "all his estate, real and personal, and of all books, vouchers and securities relative thereto," in trust, for the benefit of all his creditors, passes all his estate and interest, equitable and legal; and, therefore, includes stock of the United States, before voluntarily assigned by the debtor, when insolvent, in trust, for the benefit of his wife and children; and the trustees under the voluntary settlement were decreed to hold the stock subject to the order and disposition of the trustees under the general assignment. *Bayard v. Hoffman*, 450

4. An assignment by a debtor to trustees for the benefit of all his creditors, is valid, without the previous assent of the creditors. *Nicoll v. Mumford*, 522
5. But where the assignment is made directly to the creditors, without the intervention of trustees, the assent of the creditors is requisite to give validity to the deed of assignment. *ib.*
6. A suit by one creditor against an heir, and a decree for the sale of the assets descended, will enure for the benefit of all the creditors, and draw the distribution of the assets to this court. *Thompson v. Brown*, 619
7. So, also, in the case of executors and administrators. *ib.*
8. If a creditor seeks the aid of this court, against the real estate of his debtor, he must first show a judgment at law, creating a lien on such estate; and if he seeks aid in regard to the personal estate, he must show an execution, giving him a legal preference, or lien on the goods and chattels, which he has pursued to every available extent at law. *Brinkerhoff v. Brown*, 671
- S. P. Williams v. Brown*, 682
- S. P. McDermut v. Strong*, 687
9. This court, as well as a court of law, allows a creditor to give a preference to one debtor over another. *Williams v. Brown*, 682
10. As, where a debtor in insolvent circumstances, confesses a judgment in favour of a particular creditor, for a debt justly due, the judgment creditor will retain his priority. *ib.*
11. If, however, the debtor makes use of the judgment so confessed, for his own purpose, to effect a sale and change of the property, and it is sold at a great sacrifice, and purchased in by him, this court will allow it to be redeemed, or to be set up again, at the price at which it was sold, and resold for the benefit of the other creditors, as to any surplus beyond that price. *ib.*
12. This court assists a judgment creditor to discover and reach the property of a debtor, which is beyond the reach of an execution at law. *McDermut v. Strong*, 687
13. A judgment creditor who has taken out execution at law, and had it levied and returned, but has failed in obtaining satisfaction at law, or to reach a residuary trust interest in the chattels of his debtor, and files his bill for the aid of this court, gains, by his legal diligence, a legal preference to the assistance of this court, which cannot be affected or impaired by any subsequent assignment of that equity, by the debtor, either for the benefit of all his creditors generally, as under the insolvent act, or for the benefit of a particular creditor. *ib.*
14. Though it is the favourite policy of this court, to distribute the assets of a debtor equally among all his creditors, *pari passu*; yet when such a judicial preference has been established by the superior legal diligence of any creditor, that preference will be preserved, in the distribution of the assets. *ib.*

*Vide* JURISDICTION. EXECUTOR AND ADMINISTRATOR.

## DECREE.

*Vide* PRACTICE, XII. INFANT.

## DEED.

Where a sheriff's deed, by mistake, did not include all the parcel of land or whole premises, advertised and intended to be sold, and the defendant, and all parties, supposed the deed comprised the whole, and the purchaser bid and paid a price accordingly; the defendant was perpetually enjoined from prosecuting an ejectment at law, to recover the part not included in the deed, and was decreed to release to the plaintiff all his right and title to the same. *De Riemer v. Cantillon*, 85

## DEFAULT.

*Vide* PRACTICE, VI. 22. XII. 40. 45.

## DEMURRER.

*Vide* PLEADINGS, V.

## DEVISE.

1. A testator possessed of a large real and personal estate, bequeathed to his wife his household furniture, &c. and "her comfortable support and maintenance out of his estate, to be, from time to time, rendered and paid to her by his executors, and the use of one room in his dwelling house, during all such time as she should continue to be his widow, and no longer," and devised the rest of his estate to his children: *Held*, that though the charge of a comfortable support and maintenance

might fall on the real as well as the personal estate, it did not affect the widow's right of dower, there being nothing inconsistent in the two claims, and no express declaration of the testator on the subject; and that, therefore, the widow was not to be put to her election. *Smith v. Kniskern*, 9

2. By a devise of *all the rest and residue of the real estate* of the testator, the *rents and profits*, from the testator's death to the time of vesting the estate, will pass; and whoever takes the legal estate in the mean time, will be answerable for the profits. *Rogers v. Ross*, 388
3. The rents and profits, as well as the estate itself, may be given, by way of *executory devise*. *ib.*
4. The heir at law may be considered as a *trustee*, when it is necessary to carry the intention of the testator into effect. *ib.*
5. The rents and profits may accumulate in the hands of the heir at law, for the benefit of the executory devisee, until the vesting of the estate. *ib.*
6. Or the court may, if necessary, appoint a *receiver* of the rents and profits, for that purpose. *ib.*
7. Where the executory devisee was illegitimate, and it did not appear that the testator had any lawful heir, and no person appeared to claim the inheritance, the executor of the testator who had taken possession of the real estate, and was appointed guardian of the executory devisee, and received the rents and profits from the death of the testator to the happening of the event on which the estate was to vest, was held accountable

for them to the executory devisee. *ib.*

8. A devise of all the testator's estate, real and personal, in trust, to pay debts, and then to distribute the residue, places the assets under the jurisdiction of this court. *Benson v. Le Roy*, 651

### DISCOVERY.

*Vide* PLEADINGS, III. 11, 12, 13, 14.

### DISTRIBUTION OF ASSETS.

*Vide* ASSETS. EXECUTOR AND ADMINISTRATOR. JURISDICTION. DEBTOR AND CREDITOR.

### DIVORCE.

1. Where a divorce, a *mensa et thoro*, for cruel and inhuman treatment of the wife, by the husband, is decreed, the separation will be made *perpetual*, with a proviso that the parties may, at any time, by their mutual and voluntary act, apply to the Court for leave to be discharged from the decree. *Barrere v. Barrere*, 187
2. The wife, under the circumstances of the case, was allowed to retain the custody of an infant son, subject to the future order and direction of the Court; and the husband was directed to pay a certain sum for the support of his wife and child, and the costs of the suit. *ib.*
3. A husband cannot file a bill against his wife for a divorce *a mensa et thoro*, on the ground of cruelty, desertion, or improper conduct. *Van Veghten v. Van Veghten*, 501
4. So that, if in an answer to a bill

filed by the wife against the husband for a divorce, under the statute, on the ground of cruel treatment, the husband denies the charge, and sets up acts of cruel and abusive treatment on the part of the wife, and asks for a divorce, the bill will be dismissed. *ib.*

5. The Court will not take notice of any consent or agreement of the parties, to a divorce *a mensa et thoro*. *ib.*

### DOWER.

1. Where a testator, possessed of real and personal estate, devised to his wife his household furniture, &c. and a "comfortable support and maintenance out of his estate, to be, from time to time, rendered and paid to her by his executors," &c. *Held*, that though the charge of a comfortable support and maintenance might fall upon the real as well as the personal estate; yet, there being no express declaration of the testator on the subject, nor any thing inconsistent in the two claims, it did not affect the widow's right of dower, and she was not, therefore, to be put to her election. *Smith v. Kniskern*, 9
2. On a bill for dower, the widow was held entitled to the value of the *mesne profits* arising from the use of the undivided third of the premises of which her husband died seised, from the death of her husband, exclusive of the improvements since made thereon. *Hazen v. Thurbur*, 604
3. And there being several heirs and terre-tenants, the amount was directed to be assessed

- upon them, respectively, according to the time of their enjoyment of the premises. *ib.*
4. But as the widow had never claimed her dower, and there was no opposition or vexation on the part of the defendants, costs were denied her. *ib.*

## E.

## ELECTION.

Where the plaintiff brings a suit at law, and obtains a judgment, and at the same time files his bill against the defendant in this court, for the same matter, he will be put to his election, either to proceed at law or in this court; and if he elect to proceed at law, his bill will be dismissed; but if he elects to proceed in this court, he will be enjoined from proceeding under the judgment, without the leave of this court. *Rogers v. Vossburgh*, 84

*Vide DOWER, 1.*

## EQUITABLE ESTATE.

*Vide MORTGAGE, I. JURISDICTION, 26, 27. 29.*

## EQUITY OF REDEMPTION.

*Vide MORTGAGE, III.*

## EVIDENCE.

*Parol Evidence to explain, vary, or contradict written instruments.*

1. Parol proof is admissible to correct a mistake in a written contract, in favour of the plaintiff

seeking a specific performance of that contract; especially, where the contract, in the first instance, is imperfect without referring to facts *aliunde*. *Keisselbrack v. Livingston*, 144

2. As, where there was an agreement to execute a lease for three lives, "containing the usual clauses, restrictions, and reservations contained in leases given by the defendant;" it being necessary, by proof *dehors* the agreement, to ascertain what were the usual clauses, &c. in such a lease; it was held to be open to the plaintiff, also, to show, by parol evidence, that it was agreed and understood, at the time, that a particular reservation was not to be inserted in the lease which the defendant was to execute. *ib.*
3. Parol proof to correct a mistake in a contract is admissible, as well in favour of the plaintiff, as the defendant. *ib.*
4. Parol evidence is admissible to show that a mortgage only, not an absolute sale, was intended; and that the defendant had fraudulently attempted to convert the loan into a sale. *Strong v. Stewart*, 167

*Vide LACHES, LENGTH OF TIME AND POSSESSION.*

## EXCEPTIONS.

In Answer, *vide PRACTICE, XI. 35, 36.*

To Master's Report, *vide PRACTICE, XI. 35. 37.*

## EXECUTION.

*Vide DEBTOR AND CREDITOR, 1, 2. 8.*

13. JUDGMENT, 23. MORTGAGE, 7.

## EXECUTOR AND ADMINISTRATOR.

*Actions by and against, account, allowances, and costs in such actions.*

1. Where a plaintiff claimed as legatee and as a creditor, and proved only his right as legatee; and the defendants, who were *executors*, had caused great expense and delay, by raising unfounded objections, neither party were allowed costs. *Brown v. Rickets*, 303
2. Executors and administrators, or trustees, acting with good faith, and without any wilful default or fraud, will not be responsible for losses that may arise. *Thompson v. Brown*, 419
3. Where an executor, or other trustee, mismanages the estate confided to his care, or puts the assets in jeopardy, by his actual or impending insolvency, the court will restrain him from all further intermeddling with the estate, and compel him to restore the funds in his hands. *Elmendorf v. Lansing*, 562
4. An executor, on a bill filed against him by his co-executors, was restrained from all further interference in the management of the estate, and ordered to restore to the plaintiffs a bond and note of the estate in his possession, but not to account for the money he had received on the bond, or to pay the costs of the suit. *ib.*
5. Where an administrator of a deceased partner, without applying to the court for its direction, *bona fide*, permitted the surviving partner to sell the joint stock, in the usual course of the trade, for the joint benefit of himself and the intestate's estate, he was held not to be responsible to the creditors for any loss; though he might be personally liable for any debts contracted by such assumed partner. *Thompson v. Brown*, 619
6. But, if the administrator puts into the hands of the surviving partner, assets which he had in his own hands and under his own control, to trade with, he will be responsible for the loss. *ib.*
7. A creditor may come into this court against an executor or administrator, for a discovery of assets. *ib.*
8. Upon the usual decree to account, in a suit by one or more creditors against an executor or administrator, either separately for themselves, or specially, in behalf of themselves and all other creditors who will come in, &c. the decree is for the benefit of all the creditors, and in the nature of a judgment for all: and all the creditors are entitled, and should have notice for that purpose, to come in and prove their debts before the master; and they are to be paid, rateably, after judgment creditors are satisfied, without preference, or regard to the legal priority of specialty, over simple contract creditors. *ib.*
9. Such a suit and decree for the sale of the assets, draws to this court the entire distribution of them. *ib.*
10. A decree in this court, is equivalent to a judgment at law, and if prior in time, it is to be first paid. *ib.*
11. And from the date of the decree, and a due disclosure of assets,

an injunction will be granted, on the motion of either party, to stay all proceedings of the creditors at law. *ib.*

12. But creditors will not be restrained from proceeding at law, merely on a bill being filed against the executor or administrator in this court; and a judgment at law obtained before a decree in this court, will be protected in its priority. *ib.*

13. A widow and administratrix, who under her claim of dower, and as guardian to her infant children, had received the rents and profits of the real estate, and applied them to the necessary maintenance of the children, prior to due notice and application of creditors, was not held to account for the rents and profits so received and expended. *ib.*

14. The doctrine of equitable assets, by which all the creditors are paid *pari passu*, is not affected by the statute; *sess.* 36, *ch.* 93. (1 *N. R. L.* 36.) for the omission of the 4th section of the *English* statute, (3 *W. & M.* 114.) which excepts devises of lands to pay debts, does not vary its construction. *Benson v. Le Roy*, 681

15. And a devise of all the testator's estate, real and personal, in *trust* to pay debts and to distribute the residue, places the *assets* under the jurisdiction of this court. *ib.*

*Vide SET OFF*, 3. TRUST AND TRUSTEE, 11, 15, 16. POWER, 1, 2. DEVISE. DEBTOR AND CREDITOR.

## EXECUTORY DEVISE.

*Vide DEVISE*, 3. 5. 7.

## F.

### FEME COVERT.

*Vide* BARON AND FEME.

### FOREIGN ATTACHMENT.

*Vide* FOREIGN LAWS. BANKRUPT.

### FOREIGN CORPORATIONS.

*Vide* CORPORATIONS.

### FORECLOSURE.

*Vide* MORTGAGE, III.

### FORFEITURE OR PENALTY.

*Vide* JURISDICTION, 7, 8. 12.

### FOREIGN LAWS.

1. A debt due by C. an *American* citizen, to M. a *British* subject resident in *London*, was recovered by foreign attachment, and a judgment thereon, in the Mayor's Court of the city of *London*, in due course of law, out of monies which had come to the hands of the agents of C. in L: *Held*, that the payment of the debt by the agents of C. being compulsory and by the judgment of a court of competent jurisdiction, was a bar to a suit brought here to recover the same debt, either by M., or by *trustees* of the creditors of M., under a process of attachment which had been issued here, at the instance of an *American* creditor of M., pursuant to the act giving relief against absent debtors, &c. previous to the

process of foreign attachment in *London*. *Holmes v. Remsen*, 460

2. For the title of the foreign assignees, and of the American trustees, being equally valid under the laws of their respective countries, the debt is well paid to the party who has used the greatest legal diligence to recover it. *ib.*
3. The succession to, and distribution of, personal property, is regulated by the *lex domicilii*; not by the *lex loci rei sitæ*. *ib.*
4. A voluntary assignment, made *bona fide*, by a debtor, of all his property, for the benefit of all his creditors, is valid, and will pass debts due to him in foreign countries. *ib.*
5. So will an assignment under a bankrupt law of his country, either because it is equivalent to a voluntary assignment by the debtor; or because the *domicil* of the owner draws to it his personal property; or because, it is an established rule of *comity* among nations. *ib.*
6. Foreign laws may be proved by witnesses as matters of fact. *Brush v. Wilkins*, 520

*Vide* BANKRUPT.

### FRAUD.

1. Where the attorney of the plaintiff attended the sale of a farm of the defendant, under an execution; and the farm, which was worth two thousand dollars, was sold to the attorney for ten dollars, the gross inadequacy of the price, connected with the fact, that the sale was on a stormy day, when no person but the attorney and

deputy sheriff were present, was held sufficient to warrant the inference of fraud. *Hewell v. Baker*, 118

2. Where a judgment and execution, which had been fully paid and satisfied, were kept on foot by the assignees of the judgment, fraudulently, for the purpose of speculating on the property of the debtor, and which the defendants, assignees of the judgment, purchased at the sheriff's sale, they were decreed to execute a release of all the title and interest so acquired, to the owner of the lands, so fraudulently sold on execution, and to deliver up the possession thereof, pay the rents and profits, and damages for any waste committed, with all costs, &c. *Troup v. Wood and Sherwood*, 228
3. An agreement by the owner of an execution, on which lands to an amount in value far exceeding the debt had been seized, to prevent the usual competition at the sheriff's sale, and in order to leave a balance due on the execution, for the purpose of having lands of the debtor in other counties seized and sold, is fraudulent: and the execution is deemed in law to be satisfied. *ib.*
4. *J. S.* sold and conveyed a lot of land to *H.* and took a mortgage to secure part of the purchase money. The mortgage was duly recorded, in the county of *Onondaga*, where the land was situated; but *H.* neglected to have his deed recorded, pursuant to the statute. The defendants having purchased the claim of a person in possession without title, pro-



cured a release and quit claim from J. S. for the consideration of ten dollars, though the lot was worth six thousand dollars, and had it recorded before the deed of H. Held, that the subsequent release and quit claim by J. S. was fraudulent, the record of the mortgage being sufficient evidence that J. S. had then no title: and the defendants were decreed to release all claim to H., so as to quiet his title. *Lupton v. Cornell*, 262

### FRAUDULENT CONVEYANCES.

1. A voluntary settlement, either of lands or chattels, by a person indebted at the time, is void as against creditors. *Bayard v. Hoffman*, 450
2. Whether the statute of frauds (1 N. R. L. 75. sess. 10. c. 44. 13th Eliz. c. 5.) applies to a settlement of that kind of property which could not be reached by legal process, if no settlement had been made, such as choses in action, money in the funds, &c. ? *Quare*. *ib*.
3. An assignment by a debtor of "all his estate, real and personal, and of all books, vouchers and securities relative thereto," in trust, for the benefit of all his creditors, passes all his estate and interest, equitable and legal, and his rights of action, or as *cestui que trust*; and, therefore, includes stock of the United States before voluntarily assigned by the debtor, when insolvent, in trust, for the benefit of his wife and children; and the trustees under the vo-

luntary settlement, were decreed to hold the stock, subject to the order and disposition of the trustees of the creditors under the general assignment. *ib*.

4. It seems, that there is no difference in the construction of the 11th and 15th sections of the statute of frauds, (sess. 10. c. 44. 1 N. R. L. 75.) or the 4th and 17th sections of 29 Car. 2. c. 3. as to what is a sufficient signing of a contract by the party to be charged. *McComb v. Wright*, 659
5. An auctioneer is an agent lawfully authorized by the purchaser of lands or goods, at auction, to sign the contract of a sale for him, as the highest bidder. *ib*.
6. Writing the purchaser's name, as the highest bidder, on the memorandum of sale, by the auctioneer, immediately on receiving the bid, and knocking down the hammer, is a sufficient signing of the contract, within the statute of frauds, so as to bind the purchaser. *ib*.

### FREIGHT AND CHARTER PARTY.

1. When a ship puts into an intermediate port, in distress, and is condemned as unseaworthy; and it becomes necessary, for the transportation of the cargo saved, to its destined port, to hire another ship, the cargo, on its arrival at the port of destination, is chargeable with the increase of freight arising from the charter of the new ship: That is, the extra freight beyond what the freight would

- have been under the original charter party, if the necessity of hiring another ship had not intervened. *Searle v. Scovell*, 218
2. The owner of the goods is not answerable both for the old and new freight. *ib.*
  3. To ascertain such *extra* freight, the proper rule seems to be, to determine the difference between the amount of the freight under the original charter party, and the *rateable freight*, for the goods saved, to the port of necessity, added to the freight of the new ship hired to carry on the goods. *ib.*
  4. The *extra* freight for the renewed voyage, in such case, is a *lien* on the cargo. *ib.*

*Vide* PARTNERSHIP, 4, 5.

#### FUGITIVES FROM JUSTICE.

1. It is the law of nations to deliver up offenders charged with felonies and other high crimes, and who have fled from the country where such crimes were committed, into a foreign and friendly jurisdiction. *Matter of Washburn*, 106
2. It is the duty of the civil magistrate to commit such fugitives from justice, to the end, that a reasonable time may be afforded for the government here to deliver them up, or for the foreign government to make application to the proper authorities here for their surrender. *ib.*
3. But if such application is not made in a reasonable time, the party ought to be discharged. *ib.*
4. The evidence to detain a fugitive from justice, for the purpose of his being surrender-

ed, ought to be such as would be sufficient to commit him for trial, if the offence was committed here. *ib.*

5. The 27th article of the treaty of 1795, between the *United States* and *Great Britain*, was merely declaratory of the law of nations on this subject; and since the expiration of that treaty, the general principles of the law of nations remain obligatory on the two nations. *ib.*
6. Therefore, the Chancellor, or a Judge, in vacation, has jurisdiction to examine a prisoner brought before him, on *habeas corpus*, and who had been taken in custody on a charge of *theft*, or felony, committed in *Canada*, or a foreign state, from which he had fled; and if sufficient evidence appears against him, to remand him; otherwise, to discharge him. *ib.*

#### G.

##### GUARDIAN.

*Vide* INFANT, 1. 7. PRACTICE, II. 9.  
TRUST AND TRUSTEE, II. 10. 14.

#### H.

##### HABEAS CORPUS.

*Vide* INFANT, 1, 2. FUGITIVES FROM JUSTICE, 6.

##### HEARING.

*Vide* PRACTICE, X.

##### HEIRS AND DEVISEES.

1. A creditor may file a bill in this court against heirs and devisees

for an account, and for a sale and distribution of the real estate descended or devised, in order to make good any deficiency of *personal assets*.

*Thompson v. Brown*, 619

2. But the real estate will not be directed to be sold, until the amount of the debts and the deficiency of the personal estate have been duly ascertained. *ib.*
3. It is no objection to the sale of the real estate for the payment of debts, that the heirs are infants. *ib.*
4. And where there is a decree for the sale of the *assets* descended, it enures for the benefit of all the creditors, and draws the entire distribution of the *assets* into this court. *ib.*

*Vide DEVISE.*

## HUSBAND AND WIFE.

*Vide BARON AND FEME.*

### I.

## IDIOTS AND LUNATICS.

1. Where, on the petition of a relation of a lunatic, and who had received from him a deed of a farm, a few days before the finding of the inquisition of lunacy, an *issue* was awarded to try the fact of lunacy, and on the trial, the party was found to have been a lunatic for several years preceding, the party traversing the inquisition was ordered to pay costs. *Matter of Folger*, 169
2. The prosecutor of a charge of lunacy is not, of course, ordered to pay costs, where the party is found, by the inquisition, to

be of sound mind, if the prosecution has been in good faith, and upon probable grounds.

*Brower v. Fisher*, 441

3. A person deaf and dumb from his nativity, is not, therefore, an idiot, or *non compos mentis*; though such, perhaps, may be the legal presumption, until his mental capacity is proved, on inquiry and examination for that purpose. *ib.*

*Vide MARRIAGE*, 1, 2, 3.

## INFANT.

1. Where an infant is brought up on *habeas corpus*, the court will inquire whether he is under any illegal restraint; and if he is, will set him at liberty; but if there is no improper restraint, the court will not, in this summary way, decide upon the right of guardianship, or deliver over the infant to the custody of another. *Matter of Wollstonecraft*, 80
2. If the infant is competent to form a judgment and declare his election, the court, after examination, will allow him to go where he pleases; otherwise the court will exercise its judgment for him. *ib.*
3. Maintenance will be allowed out of the capital of an infant's estate, where the principal is small, otherwise it must be out of the interest. *Matter of Bostwick*, 100
4. Application for maintenance may be by *petition*, without bill. *ib.*
5. A parent may be allowed to be reimbursed out of the infant's estate, for *past* maintenance. *ib.*
6. Where a deed was ordered to be cancelled as fraudulent and void, on a bill for that purpose,

filed against the representatives of the grantee, and a perpetual injunction granted against using the deed or record of it in evidence; The decree was declared binding on such of the defendants, as were infants, unless within six months after coming of age, they should show cause to the contrary, on being served with process for that purpose.

*Bushnel v. Harford*, 300

7. The act concerning infants, 9th April, 1814, (*sess.* 37. *ch.* 108.) and the act in addition thereto, March 24th, 1815, (*sess.* 38. *ch.* 106.) authorizing the sale of an infant's real estate, under the order and direction of the court, do not apply to the case of a female infant who is married. *Matter of Whitaker*, 378
8. It is not the usual practice of the court to appoint a guardian to an infant, who is a *feme covert*; nor can the husband be guardian for his wife, in such case, as to the sale of her lands. *ib.*
9. These acts were intended for the better education and maintenance of infants, and for their special benefit; not that the proceeds of the sale should be placed at the disposition of the husband of the infant. *ib.*
10. It seems, that a female ward of this court is not, of course, discharged from its protection, by marriage, or without an order of the court for that purpose. *ib.*

#### INJUNCTION.

- I. *In what cases granted, and against whom.*
- II. *To stay waste or trespass.*
- III. *To stay proceedings at law.*
- IV. *Injunction for other purposes.*

#### V. *When dissolved.*

#### VI. *When made perpetual.*

- I. *In what cases granted, and against whom.*
1. An injunction is never granted against persons who are not parties to the suit. *Fellows v. Fellows*, 25
2. Where new facts are stated in a supplemental bill, a fresh injunction may be awarded, though the former injunction was dissolved on the merits. *Fanning v. Dunham*, 35
3. An injunction will be granted, to restrain persons from navigating with *Steam Boats*, in violation of the exclusive privilege granted to *Livingston* and *Fulton*, on the waters lying between *Staten Island* and *Powles Hook* and the *Jersey Shore*; the same being within the jurisdiction of this state. *Livingston v. Ogden and Gibbons*, 48
4. Where the defendants, a banking company, agreed with *B.* to hold the bills of the plaintiffs, a banking company, subject to his order, and *B.* engaged to accept the drafts of the defendants, at ten days sight, for the amount, no injunction lies to restrain the bills in their possession, or from demanding payment of them of the plaintiffs, for the agreement with *B.* merely suspended the right of the defendants to demand payment of the bills, until 10 days after the acceptance of their drafts by *B.*; and the suspension ceased when *B.* made default, in accepting and paying the drafts. *Washington and Warren Bank v. Farmer's Bank*, 62
5. A creditor in *New Jersey*, where all the parties resided,

took from the maker of a promissory note indorsed by the plaintiff, a bond and mortgage, which was ample security for the debt ; and instead of resorting to the mortgage, or the debtor, sued the plaintiff, who was transiently in this state, at law : this court granted an injunction to stay the suit at law, until the creditor had pursued his remedy on the mortgage in *New-Jersey*. *Hays v. Ward*, 123

6. Where an injunction has been already granted, a second injunction will not be granted, while the other is in force, unless the first has been withdrawn by some agreement between the parties, and satisfactory reasons shown for a renewal of it. *Livingston v. Gibbons*, 571
7. Nor will an injunction be granted to restrain the defendant, who was charged by the plaintiff with navigating the waters of this state with a *Steam Boat*, in violation of the plaintiff's exclusive right, from removing his boat, pending an action at law, brought to recover the boat as forfeited under the act of the 1st April, 1811 ; unless there is a direct and positive charge of danger that the boat will be eloiigned, pending the suit at law. *ib.*

II. *Injunction to stay waste or trespass.*

8. An injunction to stay waste, will not be granted, where the right is doubtful, or where the defendant is in possession, claiming adversely, and the plaintiff has brought an action of eject-

ment to recover the possession, at law, which is undetermined. *Storm v. Mann*, 21

III. *Injunction to stay proceedings at law.*

9. An agreement on the part of a creditor to collect the money rateably, of the several parties to a note, on their giving a bond and judgment for the amount, was enforced, by enjoining all further proceeding on the judgment against the plaintiff, on his paying into court his rateable proportion, &c. *Briggs v. Law*, 22

IV. *Injunction for other purposes.*

10. Injunction granted to restrain commissioners from proceeding to sell lands, to pay the sums assessed, under the act to amend the act, entitled, an act to incorporate the *Ulster and Orange Branch Turnpike Company*, (sess. 40. ch. 213.) for making the road, so as to give the owners of the lands an opportunity to complete the road themselves, through their own lands, within the second section of the act, according to its true construction. *Couch v. P. and D. of the Ulster and Orange Branch Turnpike Company*, 26

*Vide V. VI.*

V. *When dissolved.*

11. When the answer of the defendants denies all the equity of the bill, the injunction will be dissolved of course. *Couch v. Ulster and Orange Turnpike Company*, 26

12. Where an injunction had been granted, to stay a sale under a power contained in a mortgage, a few days before the expiration of the *six months'* notice, it was dissolved, after answer, on terms: viz. giving six weeks further notice of the time and place of sale, and a reference, in the mean time, to a master to ascertain the balance due, &c. *Nichols v. Wilson*, 115
13. When an injunction is allowed by the Chancellor, the defendant, before he puts in an answer, may move to dissolve the injunction, on the ground of a want of equity in the bill. *Minturn v. Seymour*, 173
14. Where the defendant, in answer to an injunction bill, admits the equity of the bill, but sets up new matter of defence on which he relies, the injunction will be continued to the hearing. *Minturn v. Seymour*, 497

#### VI. When made perpetual.

15. Where the plaintiff and those under whom he claims, have been in the quiet and uninterrupted possession of land, for above *twenty-five years*: an injunction restraining the defendants, (the Corporation of the City of New-York) from entering and digging down the ground so possessed by the plaintiff, was granted and made perpetual, or until the defendants shall have established, by due course of law, their right to the ground in question. *Varick v. The Corporation of the City of New-York*, 53
16. Where on a sale of land, mills, &c. in the possession of the defendants, under an execution

against them, the deed executed by the sheriff, *by mistake*, did not include the whole premises advertised and sold, the sheriff having taken the description from an original title deed for 72 acres, without advertent to subsequent conveyances, of some small parcels, adjoining the original premises: the defendants and all parties supposing the sheriff's deed included the whole, and the purchaser having bid and paid a price accordingly: *Decreed*, that the defendants be perpetually enjoined from prosecuting the ejectment; suit at law, brought by them to recover the parcels of land not included in the sheriff's deed to the purchaser; and that they execute to the purchaser a release of all their right and title to the same. *De Riemer v. Cantillon*, 85

17. Where a deed was ordered to be cancelled, as fraudulent and void, the defendants and all persons claiming under it, were perpetually enjoined from using the record of it, as evidence of title. *Bushnel v. Harford*, 301

#### Vide STEAM BOATS. JURISDICTION. PRACTICE.

#### INSOLVENT DEBTOR.

1. An insolvent debtor may, *bona fide*, assign his property to trustees, before it has become bound by any lien, in trust, for the benefit of all his creditors; and the assent of the creditors is not necessary to give legal validity to the deed of assignment. *Nicoll v. Mumford*, 522
2. But where the assignment is directly to the creditors, without

the intervention of trustees, the assent of the creditors is requisite to give it legal validity. *ib.*

*Vide* DEBTOR AND CREDITOR, 3, 4, 5. 9. 10.

### INTEREST.

On a bond conditioned to pay with interest at six per cent, for the security of which a mortgage is taken, the obligee, after a forfeiture of the bond, is not entitled to seven per cent, the lawful interest; but interest is to be paid according to the contract, until it ceases to operate, by being merged in the decree. *Müller v. Burroughs*, 436

*Vide* TRUST AND TRUSTEE, III. 18, 19. 21.

### J.

### JOINT OWNERS.

*Vide* SHIP-OWNERS, 1, 2, 3. PARTNERSHIP.

### JUDGMENT.

1. Where a judgment at law, by confession on a warrant of attorney, appears regular and formal, according to the record, this Court will not interfere with or impeach it, on the ground of any alleged irregularity, or informality, in entering it up; but will consider the rights acquired under such judgment as valid in law; especially, where several years have elapsed since the judgment, and the defendants have acquiesced in it, and in an execution and

sale under it. *De Riemer v. Cantillon*, 85

2. A judgment, after it has been fully paid and satisfied, cannot be kept on foot to cover any new demands of the plaintiff. *Troup v. Wood and Sherwood*, 228

3. Where the sheriff seizes sufficient property of the debtor, under an execution, the debtor is discharged from the judgment, and the plaintiff must look to the sheriff for his money. *ib.*

*Vide* JURISDICTION. FRAUD. SCIRE FACIAS.

### JURISDICTION.

1. Whether this court will take cognisance of a cause where the amount in controversy does not exceed the sum of fifty dollars? Or grant an injunction to stay execution on a judgment in a justice's court? *Quare. Moore v. Lytle*, 183

2. This Court possessing an exclusive jurisdiction over cases of lunacy and matrimonial causes, will sustain a suit instituted to pronounce the nullity of a marriage with a lunatic. *Wightman v. Wightman*, 343

3. So, where a marriage is unlawful and void, *ab initio*, being contrary to the law of nature, as between persons, ascendants or descendants, in the lineal line of consanguinity, or between brothers and sisters, in the collateral line, this Court, in a suit instituted for that purpose, will declare the marriage null and void. *ib.*

4. Whether the Court, there being no statute regulating marriages, or defining the prohibited degrees, which render them unlawful, will go further, and de-

- clare marriages between persons in *other* degrees of *collateral* consanguinity or affinity, void? *Quære.* *ib.*
5. This Court has no power to interfere with, or to set aside an *assessment* on the proprietors and occupants of lots, to defray the expense of a *common sewer*, made by Commissioners, under the direction of the Mayor, Aldermen and Commonalty of the city of *New-York*, pursuant to an act of the Legislature for that purpose, on the ground merely of a mistake in judgment of the Commissioners of estimate and assessment, in not including *all* the owners or occupants intended to be benefited by the sewer: there being no allegation of bad faith or partiality in the Commissioners, in making the assessment, which, after being ratified by the Common Council, is declared, by the act, to be final and conclusive. *Le Roy v. Corporation of the City of New-York,* 352
  6. The only remedy, if any, for the party aggrieved in such case, is at law. *ib.*
  7. This Court does not lend its aid to divest an estate, for the breach of a condition subsequent. *Livingston v. Tompkins,* 415
  8. It does not assist the recovery of a penalty or forfeitures or any thing in the nature of a forfeiture. *ib.*
  9. It will only interfere to protect the property from waste and destruction, or to prevent its removal out of the jurisdiction of the court, pending an action at law to recover the possession. *ib.*
  10. Where the plaintiff granted to the defendant the exclusive right of navigating with steam boats, for a certain time, between the city of *New-York* and the *Quarantine Ground* on *Staten Island*, &c. And it was provided in the grant or assignment, that if the state or legislature of *New-Jersey* should, at any time thereafter, obstruct or prevent the plaintiff from navigating with steam boats the waters of that state, that thenceforth the grant should cease and be void, &c. *Held*, that though the *casus faderis* may have occurred, yet this Court would not interfere to restrain the defendant from continuing his right under the grant to him, until the plaintiff had established the fact *at law*, and his right to resume the grant. *ib.*
  11. Equity will not aid or enforce a mere *voluntary* agreement, not valid at law, especially against a legal claim for a just debt, and where there is no consideration, accident, or fraud. *Min- turn v. Seymour,* 497
  12. This Court does not, unless under very special circumstances, sustain a bill for a compensation in damages, for breach of an agreement. *Hutch v. Cobb,* 559
  13. Where there is neither accident nor mistake, misrepresentation nor fraud, this Court has no jurisdiction to afford relief to a party, on the ground that he has lost his remedy at law, through mere *ignorance of a fact*, the knowledge of which might have been obtained by due diligence and inquiry, or by a bill of discovery. *Penny v. Martin,* 566
- Vide* PARTNERSHIP.
14. The power of this Court to apply the remedy in the case, is



- co-extensive with its jurisdiction over the subject matter. *Kershaw v. Thompson*, 609
15. A suit by one creditor against an heir, and a decree for the sale of the assets descended, will enure for the benefit of all the creditors, and draw the entire distribution of the assets into this court. *Thompson v. Brown*, 619
  16. So, in the case of executors and administrators. *ib.*
  17. So, where a testator devised all his estate, real and personal, to trustees, three of whom were his executors, in trust, to pay his debts, and then to distribute the residue. It was held, that by the trust, the assets were placed under the jurisdiction of this court. *Benson v. Le Roy*, 651
  18. And this court will, therefore, enjoin a suit brought by a creditor, at law, for the purpose of gaining a preference over other creditors. *ib.*
  19. This court does not, of course, interfere to aid or enforce an execution at law. *Brinkerhoff v. Brown*, 671
  20. If a creditor seeks the aid of this court against the real estate of his debtor, he must first show a judgment at law creating a lien on such estate; and if he seeks aid in regard to the personal estate, he must show an execution, giving him a legal preference or lien on the goods and chattels, which he has pursued, to every available extent, at law, before he can resort to equity, for relief. *ib.*
  21. It is not sufficient that the plaintiff has become a judgment creditor, in the intermediate time between the bill and the answer. And, where the defendant has made all the discovery sought for in the bill, he may object to the relief, at the hearing, on the ground that the plaintiff does not show a judgment and execution at law. *ib.*
  22. A creditor, to entitle himself to the aid of this court, in the recovery of his debt, must show that he has prosecuted his debtor, at law, to judgment and execution, so as to have gained a legal lien and preference, at the time of filing his bill, or, at least, before issue joined in the cause. *Williams v. Brown*, 682
  - S. P. M'Dermutt v. Strong*, 687
  23. This court, as well as a court of law, allows a debtor to give a preference to one creditor over another. *Williams v. Brown*, 682
  24. And where a debtor in insolvent circumstances, confesses a judgment, for a debt justly due, the judgment creditor will retain his priority. *ib.*
  25. If, however, the debtor makes use of the judgment so confessed, to effect a sale or change of the property for his own purposes, and the property is sold at a great sacrifice, and purchased in by the debtor, this court will interfere, and either allow it to be redeemed, or put up again, at the price at which it was sold, and resold, for the benefit of the other creditors, as to any surplus beyond that price. *ib.*
  26. This court has power to assist a judgment creditor to discover and reach the property of a debtor, which is beyond the reach of an execution at law. *M'Dermutt v. Strong*, 687
  27. To get possession of the equitable interest of a debtor, as a re-

- sulting trust, in goods or chattels, the creditor must come in to this court. *ib.*
28. But, before a judgment creditor can be entitled to the aid of this court, he must show an execution issued, levied and returned, and a failure of his remedy at law. *ib.*
29. A judgment creditor who so takes out execution at law, but is unable to reach a residuary trust interest in the chattels of his debtor, and files his bill for the aid of this court, gains, by his execution and legal diligence, a *legal preference* to the assistance of this Court, or a lien on the equitable interest, which cannot be affected or impaired by any subsequent assignment of that equity, by the debtor, either for the benefit of all his creditors, generally, as under the insolvent act, or for the benefit of a particular creditor. *ib.*
30. Though it is the favourite policy of this court, to distribute the *assets* of a debtor, among all his creditors, *pari passu*; yet when such a judicial preference has been established, by the superior legal diligence of any creditor, that preference will be observed in the distribution of the *assets*. *ib.*
- Vide* MARRIAGE, 2, 3, 4, 5. MORTGAGE, 23, 24. 27. FUGITIVES FROM JUSTICE. PRACTICE, III. 32. SURROGATE, 1.
- L.
- LACHES, LENGTH OF TIME, AND POSSESSION.
1. Where a farm had been occupied and cultivated for above eighty years, during which time the original tenant and his descendants uniformly paid rent to the landlord, built houses, and made valuable and permanent improvements on the remises : *Held*, that a lease in fee, at the acknowledged rent, was to be presumed to have been originally given, or, at least, that there was an *agreement* for a lease, under which the tenant took possession, and upon the faith of, and in execution of which, he made his improvements. *Ham v. Schuyler*, 1
  2. Equity, as well as a court of law may make such a presumption from length of time and possession. *ib.*
  3. Where a person having the legal title to lands, but in trust for the defendants, sold and conveyed his right and title, for a valuable consideration, to a *bona fide* purchaser, without notice, who remained in possession of the land, for eighteen years before his death, and devised the same by his will : *Held*, that after the lapse of thirty years from the date of the deed, there being no evidence of its being fraudulent, the devisees of such purchaser were entitled to hold the lands discharged from the trust. *Coxe v. Smith and others*, 271
  4. Lapse of time operates, in equity, only by way of evidence, as affording a presumption of payment. *Livingston v. Livingston*, 287
  5. Therefore, where the defendant admitted the original covenant to pay rent, and did not, in his answer, pretend to any payment : *Held*, that he could not insist on the lapse of time, being twenty years from the date of the covenant to the filing of

the bill, as presumptive evidence of payment. *ib.*

6. Where there was a perpetual lease, reserving an annual rent, and no rent had been demanded for *forty-four* years from the date of the lease; on a bill for a discovery, by the lessor, on the ground of a loss of the counterpart of the lease: *Held*, that the lapse of time was sufficient evidence that the rent had been extinguished by some act or deed of the party entitled to it. *Livingston v. Livingston*, 294
7. Where the defendant, a *bona fide* purchaser, without notice, and those under whom he claimed, had been in possession of land above *twenty-six* years, before the plaintiffs filed their bill to enforce their claim, founded on an *implied* trust, the bill was dismissed, without costs. *Shaver v. Radley*, 310

### LANDLORD AND TENANT.

*Vide* LACHES, LENGTH OF TIME AND POSSESSION, 1. 5, 6.

### LAW OF NATIONS.

*Vide* FUGITIVES FROM JUSTICE.

### LEGACY.

1. Though one legatee may sue alone for his specific legacy; yet where he claims, also, as a *residuary* legatee, all the *residuary* legatees must be made parties of the suit. *Davoue v. Fanning*, 199
2. Though the name of the legatee is entirely mistaken by the testator, as "*Cornelia Thompson*," for *Caroline Thomas*; yet the bequest is good; and the intention of the testator, and the

misnomer, being satisfactorily shown, the legacy was ordered to be paid to the person intended. *Thomas v. Stevens*, 607

### LEX LOCI.

*Vide* FOREIGN LAWS.

### LIEN.

*Vide* SHIP OWNERS, 2. JURISDICTION, 20. 22. 29.

### LIS PENDENS.

*Vide* NOTICE, 1, 2.

### LOST DEED.

*Vide* PLEADING, III. 12.

### LUNATICS.

*Vide* IDIOTS AND LUNATICS.

## M.

### MARRIAGE.

1. Though a marriage with a *lunatic* is absolutely void, yet, as well for the sake of the good order of society, as the quiet and relief of the party, its nullity should be declared by the decision of some court of competent jurisdiction. *Wightman v. Wightman*, 343
2. And this court, possessing an exclusive jurisdiction over cases of *lunacy* and *matrimonial* causes, is the proper, and, indeed, since there are no *ecclesiastical* Courts having cognizance of such causes, the only tribunal to afford relief in such a case, and sustain a suit institu-

- tad to pronounce the nullity of the marriage. *ib.*
3. Therefore, where a person, insane at the time of her marriage, after her return to a lucid interval, refused to ratify or consummate it, and filed her bill to annul it, this court decreed the marriage null and void, and the parties absolved from its obligations. *ib.*
  4. So, where a marriage is unlawful and void, *ab initio*, being contrary to the law of nature, as between persons, ascendants or descendants, in the *lineal* line of consanguinity, or between brothers and sisters, in the *collateral* line, this court will declare such a marriage, in a suit instituted for the purpose, null and void. *ib.*
  5. Whether the court, there being no statute regulating marriages, or defining the prohibited degrees which render them unlawful, will go further, and declare marriages void between persons in the other degrees of collateral consanguinity or affinity? *Quære.* *ib.*
- thereto are binding upon it. *ib.*
3. And if he hires a new ship, the *extra* freight for the renewed voyage, becomes a *lien* on the cargo. *ib.*
  4. He has no right to sell the cargo at the port of the necessity, and there put an end to the adventure, if he can hire another vessel, to carry on the cargo to its port of destination. *ib.*

### MORTGAGE.

- I. *Of the mortgage generally,*
- II. *Registry of the mortgage, and notice, as it affects the mortgages.*
- III. *Equity of redemption, foreclosure and sale; and mode of putting the purchaser into possession of the premises.*

#### I. *Of the mortgage generally.*

1. Where a mortgagee was compelled, for his own security, to satisfy an execution on a prior judgment, in favour of another, he was held, by right of substitution, to stand in the place of the judgment creditor, and entitled, on a sale of the mortgaged premises, to receive out of the fund the amount of the judgment, as well as the mortgage debt. *Silver Lake Bank v. North,* 370

### MARSHALLING OF ASSETS.

*Vide* ASSETS. EXECUTOR AND ADMINISTRATOR. JURISDICTION.

### MASTER OF A SHIP.

1. It is the duty of a master of a ship, when his vessel is disabled in the course of the voyage, to procure another ship, if he can, to take on the cargo, to its destined port. *Searle v. Scovell,* 218
2. He is in such case, from necessity, agent for the owner of the cargo; and his acts in relation

#### II. *Registry of mortgage, and notice, as it affects a mortgages.*

2. Where a prior mortgagee, or incumbrancer, witnesses a subsequent conveyance or mortgage, knowing its contents, without disclosing his own incumbrance, he will be postponed or barred. *Brimkerhoff v. Lansing,* 65

3. This rule, however, does not apply where the prior mortgage is duly registered, for then the subsequent mortgagee is charged with notice. *ib.*
4. To affect the right of such prior mortgagee, mere silence is not sufficient: there must be actual fraud charged and proved; such as false representations, or denial, on inquiry, or artful assurance of good title, or deceptive silence, when information is asked. *ib.*
5. And the burden of proving such fraud lies on the subsequent purchaser or mortgagee. *ib.*
6. A mortgage given to secure a certain sum according to the condition of a certain bond of the same date, which was conditioned to pay that sum, or indemnify the mortgagee against a note for the same sum, made by the mortgagor, and endorsed by the mortgagee, and discounted at the Bank, for the accommodation of the mortgagor, will continue, as a subsisting and valid security, as long as such note shall be run or kept alive in the Bank, in whole or in part, by renewals thereof, from time to time, according to the customary course of such transactions with the bank; such mortgage with a reference to the bond being sufficient to apprise a subsequent purchaser, or mortgagee, of the nature of the debt secured. *ib.*

### III. *Equity of Redemption ; Foreclosure and Sale, &c.*

7. A bill to foreclose the equity of redemption of a mortgage, is a proceeding *in rem*, and possession follows the decree, and

- will be enforced by the Court. *Kershaw v. Thompson*, 609
8. Where a second mortgagee was proceeding to sell the mortgaged premises, by virtue of a power contained in the mortgage, the court, as the rights of an *infant* were concerned, and it appearing to be for the interest of all parties, ordered the sale to be stayed, and that it should be under the direction of a master, associated with the mortgagee, on giving further notice of sale for six weeks; and that no more of the premises should be sold than would be sufficient to pay the amount due on the mortgage, to be computed by the master, provided the sale of a part could be made without prejudice. *Van Bergen v. Demarest*, 37
9. On a bill to redeem, further time is not usually given for the payment of the money. *Brinkerhoff v. Lansing*, 65
10. Nor will the proceedings of the mortgagee, under a power of sale contained in the mortgage, be suspended or delayed, until the plaintiffs, who are owners of the equity of redemption, in different proportions, have settled the *rateable* proportion which each is to contribute towards the redemption. *ib.*
11. But if the plaintiffs pay into court, the mortgage debt, interest and costs, the suit may be retained, for a reasonable time, to enable them to proceed against one of the defendants, who had an interest in the equity of redemption, to compel him to contribute his proportion of such debt and interest. *ib.*
12. On a bill to redeem, or for the foreclosure of a mortgage, the time allowed for the redemption

- is not fixed and certain ; but rests in the sound discretion of the court, to be regulated by circumstances. *Perine v. Dunn*, 140
13. The usual time, on a bill to redeem, is six months, from the liquidation of the debt by the master's report ; and, it seems, that when this time is allowed, it will not be, afterwards, enlarged. *ib.*
  14. On a bill for foreclosure, the time may be enlarged from six months to six months, or from three months to three months, upon equitable terms, and according to the circumstances of the case. *ib.*
  15. But this rule applies only to bills of foreclosure, strictly so called, where the equity of redemption is barred by the decree, and a complete title vested in the mortgagee ; and not to cases of a decree for the sale of the mortgaged premises according to the usual practice of the court. *ib.*
  16. Where a party fails to redeem within the time allowed, on a bill to redeem, it is usual to dismiss the bill, which amounts to a bar of the equity of redemption. *ib.*
  17. For where a bill is dismissed on the merits, without any direction that the dismissal shall be without prejudice, it may be pleaded in bar to a new bill for the same matter. *ib.*
  18. Where a bill was not simply to redeem, but to set aside a mortgage, three months only were allowed to the mortgagor. *ib.*
  19. Where a mortgagee has been detained from his remedy on the mortgage, for many years, by a long and tedious litigation, payment may be required in a much shorter time, as thirty days, after the final decision of the cause. *ib.*
  20. Parol evidence was admitted to show that a mortgage only, and not an absolute sale, was intended ; and that the defendant had fraudulently attempted to convert the loan into a sale ; and the plaintiff was, therefore, held entitled to redeem. *Strong v. Stewart*, 167
  21. If mortgaged premises are incapable of being sold in parcels, or of being divided, without injury, the whole may be sold, though the whole debt is not due ; and the proceeds applied to pay the interest and costs, and the surplus to the principal of the debt. *Campbell v. Maccomb*, 534
  22. Where, in such case, the bond having become forfeited at law, for the non payment of the interest, the whole mortgaged premises are decreed to be sold, and the mortgagor or purchaser of the equity of redemption, before the day of sale, pays the interest and costs, the sale will be stayed ; but the decree of sale and foreclosure entered, will remain as further security, to enforce the payment of future interest, and the instalments of the principal, as they respectively become due. *ib.*
  23. Though the mortgagee should be not only a trustee but a surety for the debt, and though the mortgaged premises are in a state of ruin and decay, and the security thereby impaired and rendered precarious, he is not, therefore, entitled to have the property sold, before the debt is due, or the debtor is in default. *ib.*

24. Nor will the Court, where the premises mortgaged, being a dam and bridge, were injured by storms, interfere to compel the mortgagor in possession, to repair them at his own expense. *ib.*
  25. On the sale of premises under a mortgage, it was represented that the property was free from all incumbrances; but after the sale and master's report, it was discovered, that the property was subject to a city assessment and tax; and the purchaser, therefore, refused to complete the purchase, unless the incumbrances were removed. The court, the facts being satisfactorily proved, directed the master to discharge the incumbrances out of the proceeds of the sale. *Lawrence v. Cornell*, 542
  26. The act passed April 12th, 1820, (*sess. 43. ch. 184.*) directing the sheriff or other officer, where lands are sold by virtue of any execution, to delay giving a deed to the purchaser, so as to give the debtor time to redeem within one year, on certain terms, does not apply to the case of a sale by a master, of mortgaged premises, under a decree of sale and foreclosure. *Ten Broeck v. Lansing*, 601
  27. Where, after a foreclosure and sale of mortgaged premises, the mortgagor or defendant, or any person who has come into possession under him, pending the suit, refuses to deliver up the possession, on demand, to the purchaser under the decree, the court, on motion for that purpose, will order the possession to be delivered to the purchaser, and not drive him to his action of ejectment at law, though the delivery of possession is not made a part of the decree. *Kershaw v. Thompson and others*, 609
  28. And in case of disobedience to such order, an injunction issues; and on proof of its service, and refusal by the party to obey it, a writ of assistance issues, of course, to the sheriff. *ib.*
  29. But where the delivery of possession is made part of the decree, a writ of execution is the proper remedy in case of disobedience. *ib.*
  30. A mortgagor, where the equity of redemption has been sold by a sheriff under an execution at law, has, by the act of the 12th of April, 1820, (*sess. 43. ch. 184.*) one year from the sale to redeem the land from the purchase; and, therefore, on a bill to foreclose, during the year, he ought to be made a party to the suit. *Hallock v. Smith*, 649
- Vide* INTEREST. CONTRIBUTION.
- N.
- NEW-YORK, CORPORATION OF.
- Vide* INJUNCTION, V. 15.
- NON COMPOS MENTIS.
- Vide* IDIOTS AND LUNATICS.
- NORTH RIVER STEAM BOAT COMPANY.
- Vide* STEAM BOATS.
- NOTICE.
1. Though, in a bill filed against a

- trustee of lands, for an account, and a conveyance of them to the *cestui que trust*, the description of the lands is general, as "divers lands in *Cosby's Manor*, in the patent of *Springfield*," it is enough to put a purchaser of a lot in *Cosby's Manor*, on inquiry; and being chargeable with notice of the pendency of the suit, and of all the facts in the bill, it is good notice to him that the lot purchased was a part of the trust estate mentioned in the bill. *Green v. Slayter*, 38
2. A *lis pendens*, or constructive notice of a suit pending against a trustee for an account, &c. will not prevent the payment by the debtor of a bond to the trustee, or to his assignee, being the legal owner of the bond, no receiver having been appointed by the court. *ib.*

*Vide* TRUST AND TRUSTEE. MORTGAGE.

P.

PARTITION.

1. When on a bill for partition, the legal title is disputed and doubtful, the course is, to send the plaintiff to a court of law, to have his title first established. *Coze v. Smith*, 271
2. But where the question arises upon an equitable title set up by the defendants, this court must decide on the title. *ib.*

PARTNERSHIP.

- partnership accounts, &c. *Nicoll v. Mumford*, 522
2. And that interest alone is liable to the separate creditors of each partner, claiming either by assignment or execution. *ib.*
3. An assignee, therefore, or separate creditor of one partner, is entitled only to the share of such partner, after a settlement of the accounts, and after all the just claims of the other partner are satisfied. *ib.*
4. Owners of the freight and cargo of a vessel are partners or joint tenants, and the assignee or separate creditor of one of them, takes his interest, subject to an account between him and his copartner in the voyage. *ib.*
5. But where one joint owner of the freight and cargo of a particular vessel, on a particular voyage, assigns his interest therein, one of them, who has got possession of the whole proceeds, cannot retain the share so assigned, to satisfy claims which he may have against the other, arising from former and distinct voyages or adventures, in which they have been concerned together in the same or other vessels; they not being general partners in trade, and there not being any connection between the different voyages or adventures. *ib.*
6. The Court may appoint a person to carry on trade for an infant partner. *Thompson v. Brown*, 319
7. Where the plaintiffs brought an action at law against two persons, as partners in trade, under the firm of *R. & M.*, and recovered judgment, but for which they were unable to obtain satisfaction out of their joint pro-

of each partner in property, is his subject to



erty, or the separate property of *M.*, the other partner not having been brought into court, on the *mens* process; and the plaintiffs, afterwards, discovered, for the first time, that *N.*, *L.*, and *P.*, three other persons, were *dormant* partners with *R.* and *M.*, and jointly interested in the transaction out of which the plaintiff's right of action arose: *Held*, that this Court had no jurisdiction to afford relief against the *dormant* partners. *Penny v. Martin*, 566

3. The association of the stockholders of the "*North River Steam Boat Company*," is not a *copartnership*; but the parties are tenants in common of the property and franchises belonging to the company. *Livingston v. Lynch*, 573

*Vide* EXECUTORS AND ADMINISTRATORS, 5, 6.

## PARTY WALL.

*Vide* CONTRIBUTION.

## PENALTY.

*Vide* JURISDICTION.

## PLEADINGS.

- I. *Pleadings generally*.
- II. *Parties*.
- III. *Bill*.
- IV. *Demurrer*.
- V. *Plea*.
- VI. *Answer*.

### I. *Pleadings generally*.

1. Pleadings should consist of averments or allegations of facts, stated with as much brevity and precision as possible; not of in-

ference or argument. *Hood v. Inman*, 437

2. *Impertinence* in pleadings consists in setting forth what is not necessary to be set forth; as stuffing them with recitals and long digressions as to matters wholly immaterial. *ib.*
3. Generally, the bill and answer ought not to set forth *deeds in hæc verba*; but so much of them only, as is material to the point in question: nor ought they to be argumentative or rhetorical. *ib.*

## II. *Parties*.

4. If the plaintiff, who sues as administrator, has not actually taken out letters of administration, or if the letters of administration have not been granted by the proper officer, it may be objected to by plea, or in the answer, or by demurrer; and if insisted on at the hearing, the bill will be dismissed. *Goodrich v. Pendleton*, 549
5. But if letters of administration are duly taken out at any time before the hearing, it will be sufficient, and may be charged by way of supplement or amendment to the bill. *ib.*
6. On a bill to foreclose a mortgage, all incumbrancers existing at the commencement of the suit, must be made parties. *Ensworth v. Lambert*, 605
7. Where the objection of a want of parties is made out of season, the plaintiff, instead of amending the original bill, may file a *supplemental* bill, merely to bring in the parties wanted; and the defendants in the original bill need not, in such case, be made parties to the *supplemental* bill. *ib.*

8. On a bill to foreclose a mortgage, the mortgagor whose equity of redemption has been sold by the sheriff under an execution at law, must be made a party; as he has, by the act of the 12th of April, 1820, (sess. 43. ch. 184.) one year from the sale to redeem the land from the purchase, and, therefore, an existing right of which he cannot be deprived within the year. *Hillock v. Smith*, 649
9. Where a bill was filed against C., charging him with fraud and breach of trust, as administrator of B., and the defendant, in his plea, alleged that all the acts done in relation to the estate of B., were done by him and F. jointly, as administrators, to which there was no replication: *Held*, that on the allegation in the plea, F., the co-administrator, ought to be made a party. *Brown v. Claw*, 116
10. Though one legatee may sue alone for his specific legacy, yet where he claims, also, as a residuary legatee, all the residuary legatees must be made parties to the suit. *Davous v. Fanning*, 199
11. A foreign corporation, or incorporated bank of another state, may sue in their corporate name and file a bill for the sale of land in this state, under a mortgage to secure money lent. *Silver Lake Bank v. North*, 370
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16. general demurrer to the whole bill is bad. *ib.*
17. A bill for discovery, in aid of a cause before the Surrogate, brought for an account and distribution of the intestate's estate, must charge certain facts within the knowledge of the defendant, the disclosure of which is material and necessary to the party's defence in that Court, and that he has no means of showing the facts, without such discovery. *Seymour v. Seymour*, 409
18. But, it seems, that where the bill is for discovery merely, and no injunction is asked for, and there is a demurrer to the bill, the Court will not examine so nicely as to the materiality of the discovery. *ib.*

#### IV. Demurrer.

16. Where it appears on the face of the bill, that there has been a decree in a former suit between the same parties, the defendant may demur. *Davous v. Fanning*, 199
17. If a bill blends together a demand by the plaintiff, as legatee, against the defendant, as executor, with a demand of the plaintiff, in his private capacity, against the defendant, in his individual character, it is good cause of demurrer; and the bill will be dismissed with costs. *ib.*
18. If a bill for discovery and relief be good as to the discovery, a general demurrer to the whole bill is bad. *Livingston v. Livingston*, 294

#### V. Plea.

19. A plea must be perfect in itself, so, as if true in fact, it will put

#### III. Bill.

19. If relief, as well as discovery, be prayed for, on the ground of a lost deed, there must be an affidavit of the loss. *Livingston v. Livingston*, 294
20. If a bill for discovery and relief be good as to the discovery, a

- an end to the cause. *Allen v. Randolph*, 693
20. If circumstances of fraud are charged in the bill, they must be denied by a general averment, at least. *ib.*
21. Where the bill charged misrepresentation, coercion, and fraud, in procuring a release of a debt, and the defendant put in a plea and answer, and in his plea, insisted on the release, in bar, without noticing the allegation of fraud, though in the answer it was fully met and denied, the plea was held bad. *ib.*
22. Where a bill is dismissed on the merits, without any direction that the dismissal shall be without prejudice, it may be pleaded in bar to a new bill for the same matter. *Perine v. Dunn*, 140
23. The issue, as to the truth of the plea, is to be referred to the state of facts at the time the plea is filed. *Cook & Kane v. Mancius*, 166
24. Where the defendants pleaded certain outstanding judgments, and the Court gave leave to the plaintiffs to amend their bill, by making the judgment creditors parties; and subsequent to the order for amendment, the judgments were satisfied and discharged; and the plaintiffs, instead of amending their bill, replied, taking issue on the plea; the court ordered the plaintiffs to pay the costs of the plea and the subsequent proceedings, in thirty days, or that the bill stand dismissed with costs: but if the costs were paid, then the defendants to answer the bill in six weeks, or that it be taken *pro confesso*. *ib.*
25. Though a decree in a former suit, to which the plaintiff and defendant were parties, cannot be pleaded in bar, until it is signed and enrolled, it may be insisted on by way of answer. *Davoue v. Fanning*, 199
26. Where a cause was brought to a hearing on the bill and answer, and the bill was dismissed with costs, because no person appeared for the plaintiff, and the decree was enrolled, it was held to be no bar to another suit for the same matter. *Ross v. Rust*, 306
- VI. Answer.
27. A decree in a former suit between the same parties, not signed and enrolled, though it cannot be pleaded in bar, may be insisted on by way of answer. *Davoue v. Fanning*, 199
28. Where a bill is taken *pro confesso*, against a defendant absent from the state, he may come in, after the decree, and answer and defend the suit. *ib.*
29. A defendant who submits to answer, must answer fully. *Phillips v. Prevost*, 205
30. But the general rule is subject to exception and modification according to the circumstances of the case: as where the defendant objects to a discovery because the plaintiff has no title. *ib.*
31. So, where a bill was filed by the executors of a creditor, claiming under a judgment of more than thirty-six years standing, against the legal representatives of the debtor, above thirty years after his death, without accounting for the delay, or showing any attempt to recover the debt at law, and seeking a discovery and account of assets; the defendants, after admitting the death of the original parties to

- the judgment, and the representative character of the defendants, may object to any discovery as to assets, or as to the material objects of the bill, on the ground of the staleness of the demand, and the great lapse of time *ib.*
32. A defendant is not bound to answer so as to subject himself to a penalty or forfeiture. *Livingston v. Tompkins*, 432
33. After a plea has been overruled, the same defence may be insisted on, by way of answer. *Goodrich v. Pendleton*, 551

## POWER.

1. Where a power is given to executors to sell an estate, or certain parts of it, it is a personal trust and confidence, and they cannot sell by attorney. *Berger v. Duff*, 368
2. Thus, where A. authorized his executors, B. and C., to sell certain lots of land, if, under the circumstances of the times, they should deem it prudent; and C. having gone abroad, sent a power of attorney to B., his co-executor, to sell the land on such terms as he should deem expedient: *Held*, that an agreement for the sale, entered into by B., for himself and C., was not valid, and a bill filed for a specific performance of it was, accordingly, dismissed. *ib.*

Power of sale in a mortgage, *Vide*  
MORTGAGE.

## PRACTICE.

- I. *Filing Bill, and Process.*
- II. *Appearance.*

- III. *Removal of the cause into the Circuit Court of the United States.*
- IV. *Motions, Petitions and Orders.*
- V. *Amending and dismissing the bill.*
- VI. *Taking the bill pro confesso.*
- VII. *Putting the plaintiff to his election.*
- VIII. *Amending the answer, or filing a supplemental answer.*
- IX. *Taking testimony, feigned issue, and other intermediate proceedings.*
- X. *Hearing and Rehearing.*
- XI. *Reference to a Master, Report and Exceptions.*
- XII. *Decree.*
- XIII. *Execution of Decree.*
- XIV. *Solicitors and Agents.*

I. *Filing Bill, and Process.*

1. Where an attachment is issued to enforce appearance, or to answer, the body of the writ is general, but the suit, and the cause of the attachment, are endorsed thereon, or appear in a label annexed, so that the party may, at once, comply, without application to the Court. *Matter of Vanderbilt*, 57
2. But where the attachment is issued for a contempt in disobeying an injunction, an endorsement or label, specifying the cause of action, is not necessary. *ib.*
3. On an attachment for a contempt, or for disobeying an injunction, the party is not to be bailed by the sheriff, but is to be brought before the Chancellor; to answer specific charges; and he will then be ordered to be bailed to appear, from day

to-day, until the party complaining has prepared his interrogatories, on which he is to be examined before a master.

4. A *cross* bill must be filed before publication passed in the original cause. *Gouverneur v. Elmendorf*, 367

## II. Appearance.

5. The usual mode of appearing in this court, is by entering an appearance with one of the clerks of the court. *Livingston v. Gibbons*, 94
6. But, it seems, that a notice by the defendant's solicitor, of an appearance, given to the plaintiff's solicitor, without an entry of the appearance on the clerk's minutes, would be binding on the party. *ib.*
7. An appearance filed with the register, is an appearance on the records of the court.
8. Where a defendant puts in an answer, which is read in court, by the consent of the plaintiff's counsel, and ordered to be filed with the register, it is an appearance on the records of the Court. *ib.*
9. A female defendant, unmarried, above sixty years of age, and who had been deaf and dumb from her infancy, was admitted to appear and defend by guardian. *Markle v. Markle*, 168
10. Where the plaintiff's solicitor, at the request of the defendant's solicitor, sent him a copy of the bill, and requested that an answer might be put in, it was held to be an admission of an appearance, or waiver of a formal entry of appearance; and that the defendant was, therefore, to be considered as

in Court, and entitled to be served with a rule to put in an answer, before the bill could be taken *pro confesso*. *Livingston v. Woolsey*, 365

## III. Removal of Cause into the Circuit Court of the United States.

11. If a defendant intends to remove a cause into the Circuit Court of the United States, he must file his petition, &c. for that purpose, at the time of entering his appearance in this Court. *Livingston v. Gibbons*, 94
12. Where a defendant files his answer to an injunction bill, and is heard by his counsel, on the merits of the bill and answer, and the Court makes a decretal order in the cause, it is too late to make application for the removal of the cause. *ib.*
13. Where one of two defendants is a citizen of another state, and there is no joint trust, interest, duty or concern, in the subject matter of the controversy, he may be allowed to appear and defend alone, so as to enable him to remove the cause. *ib.*

## IV. Motions, Petitions and Orders.

14. Though an order dissolving an injunction, &c. may be discharged by motion or petition, on proper grounds, yet the most regular course is to discuss the merits of the order on the rehearing. *Fanning v. Dunham*, 35
15. Application for an allowance out of the capital of an infant's estate, for his maintenance, may be by petition, without bill. *Matter of Bostwick*, 100

V. *Amending and dismissing the bill.*

16. The name of a defendant cannot be struck out of a bill, on motion of a co-defendant, without his consent, or notice of the application. *Livingston v. Gibbons and Ogden*, 94
17. Though a rule to amend the bill is of course, yet it must be actually entered with the register; for the clerk cannot allow the records to be amended, without a certified order for that purpose. *Lucas v. Graham*, 170
18. The amendments should be marked and distinguished, so that they may be easily seen by the defendant; and without being blended with, or repeating the original bill *ib.*
19. Before the plaintiff, after replication, will be allowed to amend his bill, he must obtain leave to withdraw his replication; and the materiality of the amendment, and the reason why it was not stated before, must be satisfactorily shown to the Court. *Thorn v. Germand*, 363
20. But if a witness has been examined, the pleadings cannot be altered or amended, unless under very special circumstances, or in consequence of some subsequent event, except for the purpose merely of adding parties. *ib.*
21. The proper course, when the plaintiff cannot amend his bill, is to apply for leave to file a supplemental bill. *ib.*

VI. *Taking bill pro confesso.*

22. Where a bill is taken *pro confesso*, the plaintiff cannot, therefore, take a decree; but must

set down the cause for hearing in term; but no notice of the hearing need be given to the defendant, or affixed up in either of the public offices. *Rose v. Woodroff*, 547

VII. *Putting the plaintiff to his election.*

23. Where a plaintiff has brought a suit at law, and obtained a judgment, and, at the same time, filed his bill against the defendant in this court, for the same matter, the court, on the coming in of the answer, will put him to his election, either to proceed at law, on the judgment, or in the suit brought in this court; and if he elect to proceed at law, the bill will be dismissed with costs: but if he elects to proceed in this court, he will be enjoined from proceeding under the judgment at law, without leave of this court. *Rogers v. Vosburgh*, 84

VIII. *Amending the answer, or supplemental answer.*

24. Where there is a clear mistake in an answer, and proper to be corrected, the practice is to permit the defendant to file an additional or supplemental answer. *Brown v. Cross*, 375
25. But this is allowed with great caution; and only where there is a mistake, properly speaking, as to a matter of fact. *ib.*

IX. *Taking testimony, feigned issue, and other intermediate proceedings.*

26. Where a witness is about to

depart out of the state, permanently to reside abroad, the Court, on *petition*, verified by affidavit, and motion for that purpose, will order him to be examined *de bene esse*, without previous notice of the motion.

*Rockwell v. Fulson*, 165

27. A *cross* bill must be filed before publication in the original cause.

*Gouverneur v. Elmendorf*, 357

28. It is not a matter of course to stay proceedings, or enlarge publication in the original cause, until an answer is put in to a *cross* bill filed after proceeding or answer in the original cause; but it depends on special circumstances. *ib.*

29. When there has been very great delay, and negligence, on the part of the defendant, he will not be allowed to file a *cross* bill, nor to amend his answer, nor to issue a commission, so as to delay the plaintiff. *ib.*

30. To entitle the plaintiff, before hearing, or publication, or issue joined, to call for the inspection of papers, accounts, &c. it is not sufficient that there has been a general reference to them in the answer, or in the schedule annexed to it. They must be described with reasonable certainty in the answer, or in the schedule annexed to it, so as to be considered, by the reference, as incorporated in the answer, which must admit them to be in the possession or power of the defendant: and it must appear that the plaintiff has an interest in the production of the papers, books, or instruments sought after. *Watson v. Renwick*, 381

31. A re-examination of witnesses is not of course, but only on special application to the Court,

and on sufficient cause shown, by affidavit, or otherwise, according to circumstances. *Hallock v. Smith*, 649

### X. Hearing and Rehearing.

32. It is too late to object to the jurisdiction of the Court, at the hearing, after the defendant has answered, and put himself on the merits, instead of demurring to so much of the bill as seeks relief. *Livingston v. Livingston*, 287

33. After hearing, and a final decree in the cause, a witness cannot be re-examined to explain or correct his testimony taken on his examination in chief, and read at the hearing, unless, perhaps, under very special circumstances. *Gray v. Murray*, 412

34. A voluntary *ex parte* affidavit of a witness, to explain and correct a mistake in his former testimony, cannot be read at a rehearing of the cause. *ib.*

### XI. Reference to a Master, Report, and Exceptions.

35. There is no precise time for filing exceptions to the report of a master, on the insufficiency of an answer, as it does not require confirmation. *Myers v. Bradford*, 434

36. On filing the report in such case, the plaintiff may immediately sue out a subpoena for a better answer, and for costs; and if the defendant does not file exceptions to the report, and obtain an order for setting them down for hearing, within eight days from the service of the *subpana*, the plaintiff may sue out an attachment; after

which the defendant cannot except to the report. . . *ib.*

37. If the decretal order of reference is silent as to the mode of calculating interest, and the master does not allow *annual rests*, the plaintiff should apply, on the coming in of the report, for an order on the master to report his reasons for rejecting the claim, or make the rejection a ground of *exception* to the report. If he does neither, and the report is confirmed, he cannot, on a final hearing on the equity reserved, make the objection to the report. . . *Smith v. Smith*, 445

#### *Vide* TRUST AND TRUSTEE.

#### XII. Decree.

38. A decree cannot be impeached by an original bill, except on the ground of fraud. *Davoue v. Fanning*, 199
39. Though a decree in a former suit, to which the plaintiff and defendant were parties, cannot be pleaded in bar, until it is signed and enrolled, it may be insisted on by way of answer. And, when the decree in the former suit appears on the face of the bill, the defendant may demur. . . *ib.*
40. Where a bill is taken *pro confesso*, against a defendant, who is absent from the state, he may, under the statute, come in, after the decree, and answer and defend the suit. But he cannot institute a new suit, while the decree in the former suit remains in force. . . *ib.*
41. Where a cause was set down for hearing, on the bill and answer, and the bill was dismissed

with costs, because no person appeared for the plaintiff, and the decree was enrolled, it was held to be no bar to another suit for the same matter. *Rosse v. Rust*, 300

42. Where one of the defendants dies after the argument of a cause, and before judgment, the decree may be entered, so as to have relation back to the day of the final hearing. *Campbell v. Messier*, 334
43. A decree, after it has been entered, but before it is enrolled, may be corrected, where the omission or mistake was inadvertent, and is clearly ascertained. *Lawrence v. Cornell*, 545
44. A decree is never pronounced, unless the cause is regularly set down for hearing in term, except when it is submitted out of term, by consent of all parties; but the decree may be, afterwards, entered in term time, or in vacation, at the discretion of the Chancellor. *Rose v. Woodruff*, 547
45. Where a bill is taken *pro confesso*, the plaintiff cannot, therefore, take a decree; but must set down the cause for hearing in term; but no notice of the hearing need be given to the defendant, or affixed up in either of the public offices. . . *ib.*
46. A decree of this court is equivalent to a judgment at law; and in the case of executors and administrators, if it is prior to a judgment at law, it will be first paid. *Thompson v. Brown*, 619

#### XIII. Execution of Decree.

47. If, after a foreclosure and sale



of mortgaged premises, the mortgagor, or defendant, or any person who has come into possession under him, pending the suit, refuses to deliver up the possession, on demand, to the purchaser under the decree, the court, on motion for that purpose, will order the possession to be delivered to the purchaser, and not drive him to an action of ejectment at law; though the delivery of possession is not made part of the decree. *Kershaw v. Thompson*, 609

48. In case of disobedience to such an order, an injunction issues, of course, on affidavit of service of the order, &c. And on proof of the service of the injunction, and a refusal by the party to comply with it, a writ of assistance issues, of course, to the sheriff. *ib.*
49. But where the delivery of possession is made part of the decree, a writ of execution is the proper remedy, in case of disobedience. *ib.*

*Vide* JUDGMENT. INFANT.

As to PARTIES, *vide* PLEADINGS, I.

As to PLEADINGS, *vide* PLEADINGS.

#### XIV. Solicitors and Agents.

50. Where a solicitor files a bill in *propria persona*, as plaintiff, a notice served on his agent, as solicitor of the court, is good service. *Champlin v. Fonda & Lansing*, 62

*Vide* SOLICITOR AND ATTORNEY.

#### PRESUMPTION.

*Vide* LACHES, LENGTH OF TIME AND POSSESSION, 1, 2, 3, 4, 5, 6.

#### PRO CONFESSO.

*Vide* PRACTICE, VI.

#### PROCESS.

*Vide* PRACTICE, I.

#### PROBATE.

*Vide* SURROGATE.

#### REFERENCE.

To a Master, *vide* PRACTICE, XI.

#### REHEARING.

*Vide* PRACTICE, X.

#### R.

#### RELEASE.

*Release* by an Assignee, *vide* ASSIGNMENT.

#### REMOVAL OF CAUSES.

Into the Circuit Court of the United States, *vide* PRACTICE, III.

#### RENT.

1. *Rent* may be recovered in equity, where the remedy has become difficult or doubtful at law, or where there is a perplexity or uncertainty as to the title, or the extent of the tenant's responsibility. *Livingston v. Livingston*, 287

2. Where no rent had been demanded for *forty-four* years from the date of the lease, on a bill of discovery filed by the lessor, on the ground of a loss of the counterpart of the lease, it was held, that the lapse of time was sufficient evidence that the rent had been extinguished by some act or deed of the party entitled to it. *Livingston v. Livingston*; 294

Rents and Profits, *Vide* DEVISE.

### REVOCATION.

Of a will, *Vide* WILL.

### S.

### SALE.

By a Master, *Vide* MORTGAGE, III.

At Auction, *Vide* FRAUDULENT CONVEYANCES. VENDOR and PURCHASER.

### SCIRE FACIAS.

Writs of *scire facias*, directed to a person convicted of felony, and sentenced to imprisonment in the State Prison for life, to revive a judgment against him, and *nil* returned thereon, can have no legal operation or effect whatever; for such convict, being regarded as *civiliter mortuus*, the *scire facias* must be directed to his legal representatives or terre-tenants. *Troup v. Wood and Sherwood*, 238

### SEPARATION.

From bed and board. *Vide* BARON AND FEME.

### SET-OFF.

1. Joint and separate debts cannot

be set-off against each other in equity, any more than at law. *Dale v. Cooke*, 11

2. To authorise a set-off, the debts must be mutual, and due to and from the same persons, in the same capacity. *ib.*

3. A debt arising on a contract made with an executor, cannot be set-off against a debt due from the testator. *ib.*

4. Uncertain damages cannot be set-off in equity any more than at law. *Livingston v. Livingston*, 287

5. Therefore, on a bill of discovery, and for an account and payment of arrears of rent, the defendant is not entitled to be allowed, by way of set-off, damages for the breach of a covenant, on the part of the grantor, to allow him sufficient *compon* of pasture and estovers. *ib.*

### SETTLEMENT. (*Voluntary*.)

1. A voluntary settlement either of lands or chattels, by a person indebted at the time, is void as against creditors. *Bayard v. Hoffman*, 450
2. Whether the statute of frauds, applies to a settlement of that kind of property which could not be reached by legal process, if no settlement had been made, such as *choses in action*, money in the funds, stock, &c.? *Quere. ib.*

*Vide* FRAUDULENT CONVEYANCES.

### SHERIFF.

*Vide* EXECUTION.

### SHIP OWNERS.

1. Ship owners are tenants in com-

mon, not joint tenants or partners; and one of them, where the vessel has been sold, knowing that the share of the others had been lawfully assigned, has no right to possess himself of the whole proceeds, with a view to retain such share, to satisfy any claims he may have against the other. *Nicoll v. Mumford*, 522

2. The assignee of one part owner of a vessel, is entitled to his part, or the proceeds thereof, without being subject to any general balance of account between the owners. *ib.*

3. But owners of the freight and cargo are joint tenants or partners. *ib.*

*Vide* PARTNERSHIP.

SOLICITOR AND ATTORNEY.

Whether an attorney or solicitor of the plaintiff can purchase the property of the defendant, at sheriff's sale, under an execution, for his benefit? *Quere.* *Howell v. Baker*, 118

SPECIFIC PERFORMANCE.

*Vide* AWARD.

STATE JURISDICTION.

1. By the declaration of the statute, passed April 6th, 1808, (1 *N. R. L.* 238. *sess.* 31. c. 135.) as well as by immemorial usage, the whole of the Hudson river, southward of the boundary of the city of New-York, and the whole of the Bay between Staten Island and Long or Nassau Island, are within the jurisdiction of this state. *Livingston v. Ogden and Gibbons*, 48

2. Therefore, a legislative grant of the exclusive privilege of navigating with *Steam Boats*, "in all creeks, rivers, bays, and whatsoever, within the territory or jurisdiction of the state," comprehends all the waters lying between Staten Island and Powles Hook, and the Jersey shore, as being within the jurisdiction of the state, either as part of the Hudson River or the Bay. *ib.*

3. The waters between Staten Island and the Whitshall Landing in the city of New-York are part of the bay of New-York. *Matter of Vanderbilt*, 57

STATUTES CONSTRUED, EXPLAINED, OR CITED.

1787, Feb. 20. *Sess.* 10. c. 44: (Frauds,) 450. 659  
1808, April 6. *Sess.* 31. c. 144. (Jurisdiction of the state,) 48  
1813, April 6. *Sess.* 36. c. 71, (Bank notes, and Banking associations,) 329  
—, — 6. *Sess.* 36. c. 79. (Court of Probates and Surrogates,) 409. 549  
—, — 12. *Sess.* 36. c. 100. (Partition,) 278  
—, — 13. *Sess.* 36. c. 102. (Divorces,) 187  
1814, April 9. *Sess.* 37. c. 108. (Infants,) 378  
1815, March 24. *Sess.* 38. c. 106. (Infants,) 378  
—, April 11. *Sess.* 38. c. 157. (Surrogates,) 549  
—, — 17. *Sess.* 38. c. 221. (Divorces,) 197  
1817, April 11. *Sess.* 40. c. 213. (Ulster and Orange Turnpike,) 26  
1818, April 21. *Sess.* 41. c. 277. (Habeas Corpus,) 106

1820, April 12. Sess. 43. c. 184.  
(Executions,) 601, 649

Various acts concerning Steam  
Boats, 150. 572

*Et vide* STEAM BOATS.

### STEAM BOATS.

1. The several acts of the legislature of this state, granting and securing to *R. R. Livingston*, and *Robert Fulton*, and their assigns, the sole and exclusive right of using and navigating boats or vessels, by steam or fire, in the waters of this state, for a certain number of years, are constitutional and valid acts. *Ogden v. Gibbons*, 150
2. And this Court will grant an injunction to restrain the citizens of another state from navigating the waters of this state by vessels propelled by steam, without the consent of the said *R. R. L.* and *R. F.* or their assigns, although such vessels may have been enrolled and licensed under the laws of the *United States*, as coasting vessels. *ib.*
3. The running or employing *Steam Boats*, over the waters of this state, for the transportation of passengers between the city of *New-York* and *Elizabethtown* point in *New-Jersey*, directly, or circuitously, by one or more *Steam Boats*, and shifting the passengers from one boat to another, at any intermediate point between those two places, without the consent of the person to whom *Livingston* and *Fulton* had assigned the exclusive right of navigating *Steam Boats* between those two places, is a violation of the right of such assignee : and an injunction was granted to restrain the defendant from so using or navigating *Steam Boats*, to the injury of the plaintiff. *Ogden v. Gibbons*, 174
4. Where the plaintiff, having an exclusive right to navigate with *Steam Boats*, the waters of the *Bay of New-York*, and that part of the *Hudson river*, south of the state prison, granted to the defendant the exclusive right of navigating with *Steam Boats* between the city of *New-York*, and the *Quarantine Ground* on *Staten Island*, &c. and it was provided in the grant or assignment, that if the state or legislature of *New Jersey* should, at any time thereafter, obstruct or prevent the plaintiff from navigating with *Steam Boats*, the waters of that state, that thenceforth the grant should cease and be void : Held that though the *casus fœderis* may have occurred, yet this Court would not interfere to restrain the defendant from continuing to exercise his right under the grant to him, until the plaintiff had established the fact at law, and his right to resume the grant. *Livingston v. Tompkins*, 415
5. The association of stockholders of the *North River Steam Boat Company* is not a copartnership, but the parties are tenants in common of the property and franchises of the company. *Livingston v. Lynch*, 573
6. The resolutions passed by the unanimous votes of the stockholders, on the 13th and 14th April, 1817, and subscribed by all of them, are the fundamental articles or constitution of the company, by which the former articles of agreement of the 26th July, 1814, were abrogated ; and the company being

only a private association of individuals, these articles cannot be altered or revoked, but by the like unanimous consent of all the stockholders. *ib.*

7. Therefore, certain resolutions passed the 5th May, 1819, not having been consented to by all the stockholders, and being repugnant to the *fundamental* articles of the association, are null and void. *ib.*

*Vide* INJUNCTION.

### SUBSTITUTION.

*Vide* MORTGAGE, I. CONTRIBUTION.

### SURETY.

1. A surety who pays the debt, is entitled to be put in the place of the creditor, and to all the means, and to every remedy which the creditor possesses, to enforce payment from the principal debtor. *Hayes v. Ward*, 123
2. If, therefore, a creditor takes a mortgage from the principal debtor, he does it not only for his own security, but for the indemnity of his surety; and he must do no act by which it may be invalidated, in the first instance, or be subsequently defeated or destroyed. *ib.*
3. Whether the surety can compel the creditor to resort first to the principal debtor, and exhaust his remedies against him, before resorting to the surety? *Quere.* *ib.*
4. Where the surety apprehends danger from the delay of the creditor, he may compel the creditor to sue the principal debtor; at least, on indemnifying the creditor for the conse-

quences of risk, delay, or expense. *ib.*

5. A creditor in *New-Jersey*, where all the parties resided, took from the maker of a promissory note, indorsed by the plaintiff, a bond and mortgage, which was ample security for the debt; and, instead of resorting to the mortgage or the principal debtor, sued the plaintiff (who was transiently in this state) at law: This court granted an injunction to stay the suit at law, until the creditor had pursued his remedy on the mortgage in *New-Jersey*. *ib.*
6. A creditor having a particular fund, may be compelled to resort to that fund, before he pursues the debtor personally. *ib.*
7. Where an indorser of a note discounted by the *Ulrica Insurance Company*, not being an incorporated banking association, took from the makers of the note a bond and judgment for his indemnity and security, and without any fraudulent intent to evade the act restraining unincorporated banking associations; (2 *N. R. L.*, 235. sess. 36. ch. 71.) the bond and judgment were deemed valid; and the Court refused to interfere, at the instance of a purchaser under a subsequent judgment, to prevent the indorser from obtaining payment of the judgment to him, he having been sued as indorser, and a judgment recovered against him. *Parker v. Rochester*, 329
8. A surety cannot sue the principal debtor for his indemnity or discharge, before the debt is due. *Campbell v. Maccomb*, 538
9. As where a mortgagee, holding a mortgage, as a trustee for others, was, also, a guarantee

or surety for the debt, and the mortgaged premises were in a state of ruin and decay from storms, and the security thereby rendered precarious; yet, he cannot file a bill for the sale of the property, the debt not being due, nor the mortgagor in default. *ib.*

### SURROGATES.

1. A surrogate has concurrent jurisdiction with this Court, to compel administrators to account, and to make distribution of the estate. *Seymour v. Seymour*, 409
2. Where administrators have been brought before the surrogate who granted the letters of administration, for an account and distribution of the intestate's personal estate, this court will not, without some special and satisfactory reason, interfere with the proceedings of the surrogate, by granting an injunction, and sustaining a bill for general relief. *ib.*
3. A bill of discovery, in aid of the cause before the surrogate, must charge certain facts within the knowledge of the defendant, the disclosure of which is material and necessary to the party's defence in that court, and that he has no means of showing the facts without such discovery. *ib.*
4. The surrogate of the city and county of New-York, has no authority to grant letters of administration with the will annexed, of a person dying out of the state, not being an inhabitant of the state. *Goodrich v. Pendleton*, 549
5. His powers, though they may exceed those of the county surrogates, who have no power to

grant letters of administration of the goods of persons dying intestate out of the state, not being inhabitants of the state, are limited, in this respect, by the acts, sess. 36, ch. 79, §. 17, sess. 38, ch. 159. *ib.* the case of a non-resident of the state, dying intestate, and leaving goods and chattels in the city of New-York. *ib.*

### T.

### TENANTS IN COMMON.

Of a Ship. *Vide* SHIP OWNERS.

### TREATY.

Between Great Britain and the United States, *vide* FUGITIVES FROM JUSTICE.

### TRUST AND TRUSTEES.

- I. How trusts are created, and their incidents. *Cestui que trust and trust estate.*
- II. Authority and duty of a trustee.
- III. Trustee's accounts. *Allowances to, and charges against.*
- I. How trusts are created, and their incidents. *Cestui que trust and trust estate.*
1. Though a trust be created for the benefit of a third person, as a creditor, without his knowledge, at the time, he may, afterwards, affirm the trust, and enforce its execution. *Shepherd v. McEvers*, 136
2. Where trustees have accepted the trust, and entered on its execution, they cannot, afterwards, without the consent of the *cestui que trust*, or the directions of the court, surrender the trust, or discharge themselves from it. *ib.*

3. The vested interest of a *cestui que trust*, cannot be impaired or destroyed by the voluntary act of the trustee; but the trust will follow the land in the hands of the person to whom it has been conveyed by the trustee, with knowledge of the trust, *ib.*

4. Where S., a *cestui que trust*, resided abroad; and before he was informed of a trust, created by a deed of his debtor, for the benefit of his creditors, the trustees, without the assent of the *cestui que trust*, or the direction of this court, conveyed the trust estate to others, upon other trusts and conditions, which, in their operation, would have excluded S. from all share or benefit in the trust estate; the trustees in the second deed were held chargeable with the trusts in the first deed, of which they had full knowledge at the time. *ib.*

5. If a trustee by implication, is to be affected by an equity, that equity must be pursued within a reasonable time. *Shaver v. Rddley*, 310

6. A devise of all the estate, real and personal, of the testator, in trust, to pay debts, and to distribute the residue, places the assets under the jurisdiction of this court. *Benson v. Le Roy*, 651

**Vide LACHES, LAPSE OF TIME AND POSSESSION.**

**II. Authority and duty of a trustee.**

7. Where the farm of a defendant, worth two thousand dollars, was sold under a judgment and execution on which there was not more than eighty dollars due, to the attorney of the plaintiff,

who attended the sheriff's sale, for ten dollars: *Held*, that under the circumstances, the purchase by the attorney was not to be considered as absolute, or as originally intended for his own benefit, but in trust for the respective interests of the parties to the execution; and the debtor, on a bill filed by him for that purpose, was allowed to redeem the estate, on paying the balance due on the execution, the amount paid by the attorney, with interest and costs. *Howel v. Baker*, 118

8. A person entrusted with business, as an attorney or agent for another, ought not to be allowed to make that business an object of interest or profit to himself. *ib.*

9. Whether an attorney or solicitor for the plaintiff can purchase the property of the defendant sold under execution, for his own benefit? *Quere. ib.*

10. If a guardian or other trustee, lends the money of the *cestui que trust*, without due security, he will be responsible, in case the borrower becomes insolvent. *Smith v. Smith*, 281

11. What is due security for moneys loaned by a trustee, appears to be a point not fully settled. *ib.*

12. It seems, that, in general, mere personal security is not sufficient to protect the trustee from responsibility, in case of loss. *ib.*

13. Where a guardian took promissory notes of persons, solvent at the time of taking the account before the master, under a decretal order of the court, on a bill filed for an account, and which notes were allowed by the master and credited to the guardian, who was ready to deliver them up; the

- court* confirmed the report of the master; the notes being for small sums, for rents, &c. and the credit and course of business according to the practice of the testator, in his life time. *ib.*
14. A guardian or trustee is not held to account for any neglect or breach of duty not charged in the bill. *ib.*
15. An executor or trustee is not allowed to use the trust money, and retain the profits arising from it. *Brown v. Rickets*, 303
16. If a trustee or executor mixes the trust money with his own, and uses it in his business or trade, the profits of which are not known, he must pay interest. *ib.*
- III. *Trustee's accounts. Allowances to, and charges against.*
17. Trustees acting with good faith, are treated with liberality and indulgence. And if there is no wilful misconduct or fraud on the part of a trustee or executor, he will not be held responsible for a loss, especially where he acts with the advice of counsel. *Thompson v. Brown*, 619
18. A trustee who mixes the trust money with his own, and uses it in his business or trade, the profits of which are not known, must pay interest. *Brown v. Rickets*, 303
19. But where there was no direction in the order of reference to the master, to inquire into the use and profit of the fund, and he had charged the party with interest, the report, to prevent the effect of surprise on the party, was re-committed to the master to take further proofs or explanations, and to correct any mistakes. *ib.*
20. Where the securities held by a trustee, are directed by a decree confirming a master's report, to be assigned to the *cestui que trust*, the responsibility of the trustee ceases; and there having been no culpable negligence or default on his part in taking the securities, he is not to be charged with them, on making the final decree, on the equity reserved, though they may have been, perhaps, impaired by the delay of the litigation between the parties. *Smith v. Smith*, 445
21. If a decretal order of reference is silent as to the mode of calculating interest, and the master does not allow *annual rests*, the plaintiff should apply, on the coming in of the master's report, for an order on the Master, to report his reasons for rejecting the claim, or make the rejection a ground of *exception* to the report. If he does neither, he cannot, on the final hearing on the equity reserved, make the objection to the report. *ib.*
22. In a suit by a *cestui que trust* against his trustees, for an account, &c. no costs were allowed to the plaintiff, the conduct of the defendants being fair and honest, and the allegations of misconduct unfounded. *ib.*

*Vide* VENDOR AND PURCHASER. EXECUTOR AND ADMINISTRATOR.

VENDOR AND PURCHASER.

1. Where a bill was filed against a trustee for an account, and that he should convey to the *cestui que trust*, the trust estate held by him, describing the same as "divers land in *Cosby's Manor*,



in the patent of *Springfield*, and certain tracts or parcels of land in the *Oriskany Patent*," &c. And the trustee, previous to the filing of the bill, sold some of the land to *S.*, and took a mortgage for the purchase money, in his individual name, and assigned the bond and mortgage to *H.*; and *S.*, who purchased, without any knowledge of the trust, afterwards, and after the filing of the bill, paid the bond and mortgage to *H.*, without any actual notice of the pendency of the suit against the trustee, or of the trust; *Held*, that *S.* was chargeable with notice of the pendency of the suit and of the facts stated in the bill; and that the description of the lands, though general, was sufficient to put him on inquiry; and, therefore, good notice to him that the lots which he purchased were part of the trust estate. *Green v. Slayter and others*, 38

2. But as the trustee, no receiver having been appointed, had a legal authority to receive payment of the mortgage, the payment by *S.* to him, and to *H.* his assignee, was good; for nothing but notice in fact, in such a case, can prevent a payment by the debtor, to the legal owner of the bond. *ib.*
3. Where one person bids for another, at auction, but does not, at the time the lot is knocked down to him, nor on the day of sale, disclose to the vendor, nor to the auctioneer, the name of his principal, he is responsible as the purchaser. *McComb v. Wright*, 659
4. If there is any doubt or difficulty as to the title, it will be referred to a master, to examine and report thereon. *ib.*

5. An auctioneer is an agent lawfully authorized by the purchaser of lands or goods at auction, to sign the contract of sale for him, as the highest bidder. *ib.*
6. And writing his name, as the highest bidder, in the memorandum of sale, by the auctioneer, immediately on receiving his bid, and knocking down the hammer, is a sufficient signing within the statute of frauds, to bind the purchaser. *ib.*

*Vide* FRAUDULENT CONVEYANCE.

ULSTER AND ORANGE BRANCH TURNPIKE COMPANY.

According to the true construction of the Act to amend the act, entitled an act to incorporate the *Ulster and Orange Branch Turnpike Company*, (*sess.* 40. ch. 213. s. 2.) the owners of lands assessed under the act, are entitled to make the road through their own lands, under the inspection of the company, by the first of August, next after the assessment is made and completed. *Couch v. Ulster and Orange Branch Turnpike Company*, 26

*Vide* INJUNCTION, IV, V.

UTICA INSURANCE COMPANY.

Admitting that the *Utica Insurance Company* have no banking powers, and that notes and securities for the payment of money to them, as a banking association, are void by the act; (*sess.* 36. ch. 71.) yet a bond and judgment confessed thereon, by the makers of a note discounted by the Company, for the indemnity and security of the endorser, without any fraudulent intent to

evade the law, are valid. *Par-*  
*ker v. Rochester,* 329

## W.

### WASTE.

*Vide* INJUNCTION, II.

### WILL.

1. Subsequent marriage and birth of a child are an implied revocation of a will either of real or personal estate. *Brush v. Wilkins,* 506
2. But such presumptive revocation may be rebutted by circumstances. *ib.*
3. *It seems,* that a subsequent marriage or subsequent birth of a child alone, will not amount to an implied revocation. *ib.*
4. Implied revocations of wills are not within the statute of frauds. *ib.*

5. A will duly executed, but revoked by a subsequent marriage and birth of a child, cannot be connected with a will subsequently made, but not executed with the requisite solemnities to pass real estate, so as to constitute a valid will; but the estate descends to the heir at law. *ib.*
6. Where the will of the testator is so ambiguously expressed, as to render it proper for the executor to take the direction of the court, the costs of the suit will be ordered to be paid out of the fund in controversy. *Rogers v. Ross,* 608

*Vide* DEVISE.

### WITNESS.

*Vide* MORTGAGE. PRACTICE, IX.

END OF VOLUME IV.

E. J. K.

## ERRATA.

Page 4, line 7, for "most" read least.

13, line 30, *dele* "separate" before "cases."

41, line 30, for "assessment" read assignment.

72, in the marginal note, for "cumbrance" read incumbrance.

86, line 10, for "against" read adjoining.

88, line 18, after "sold" insert after her death,

96, line 4, for "jointly" read justly.

106, line 32, before "punish" insert to.

34, for "his" read this.

110, line 14, for "18" read 28.

111, line 31, for "county" read country.

113, line 26, for "this" read the.

115, line 3, for "one not" read not one.

121, line 22, for "was" read were.

126, line 26, after "and" insert the fact was.

131, line 38, for "security" read surety.

132, line 15, for "reasonable" read unreasonable.

133, line 11, after "apply to" insert the surety, before applying to.

136, 17th line of the head note, for "joint" read trust.

137, line 30, for "proportion" read proportions.

150, line 3, for "1817" read 1787.

170, line 17, for "levied" read taxed.

178, line 13, before "to be" insert were.

183, line 2, for "prohibit" read protect.

187, first line of head note, for "there" read *thence*.

189, line 26, for "common" read canon.

192, line 11, for "quosque" read *quousque*.

193, line 26, for "231" read 331.

196, line 6, for "common" read canon.

7, for "other" read the.

200, lines 24 and 25, for "did not hear" read not hearing.

line 26, *dele* "the plaintiff"

231, line 23, for "conceiving" read conceived.

234, line 3, for "were" read was.

281, in the sixth line of the head note, for "testator" read trustee,

282, line 30, after "made" insert by them.

310, in the eleventh line of the head note, after "held" insert not.

line 2, for "Makane" read *Makane*.

312, line 9, for "were" read was.

347, 1, for "heedless" read unheeded.

350, line 19, for "1818" read 1819.

350, line 26, for "profit" read profits.

405, line 3, for "Gimmer's" read *Zimmer's*.

422, line 15, for "months" read month.

433, line 22, for "several" read severe.

438, line 17, for "Harris' Ch." read *Harrison's Ch. Pr.*

464, line 12, for "fatu" read *fatu*.

466, line 21, insert 5 before "Cranch."

466, line 4, insert 1 before "Dom's."

467, in the marginal note, line 27, insert it, after "to."

511, line 2, for "rumpuntur" read *rumpuntur*.

541, line 20, insert but, after "sale."

547, in the 7th and 8th lines of the head note, *dele* the words, "and the clerk must attend with the record of the bill, to be read at the hearing."

549, in the third line of the head note, for "residing" read *dying*.

638, line 12, for "first" read *fourth*.

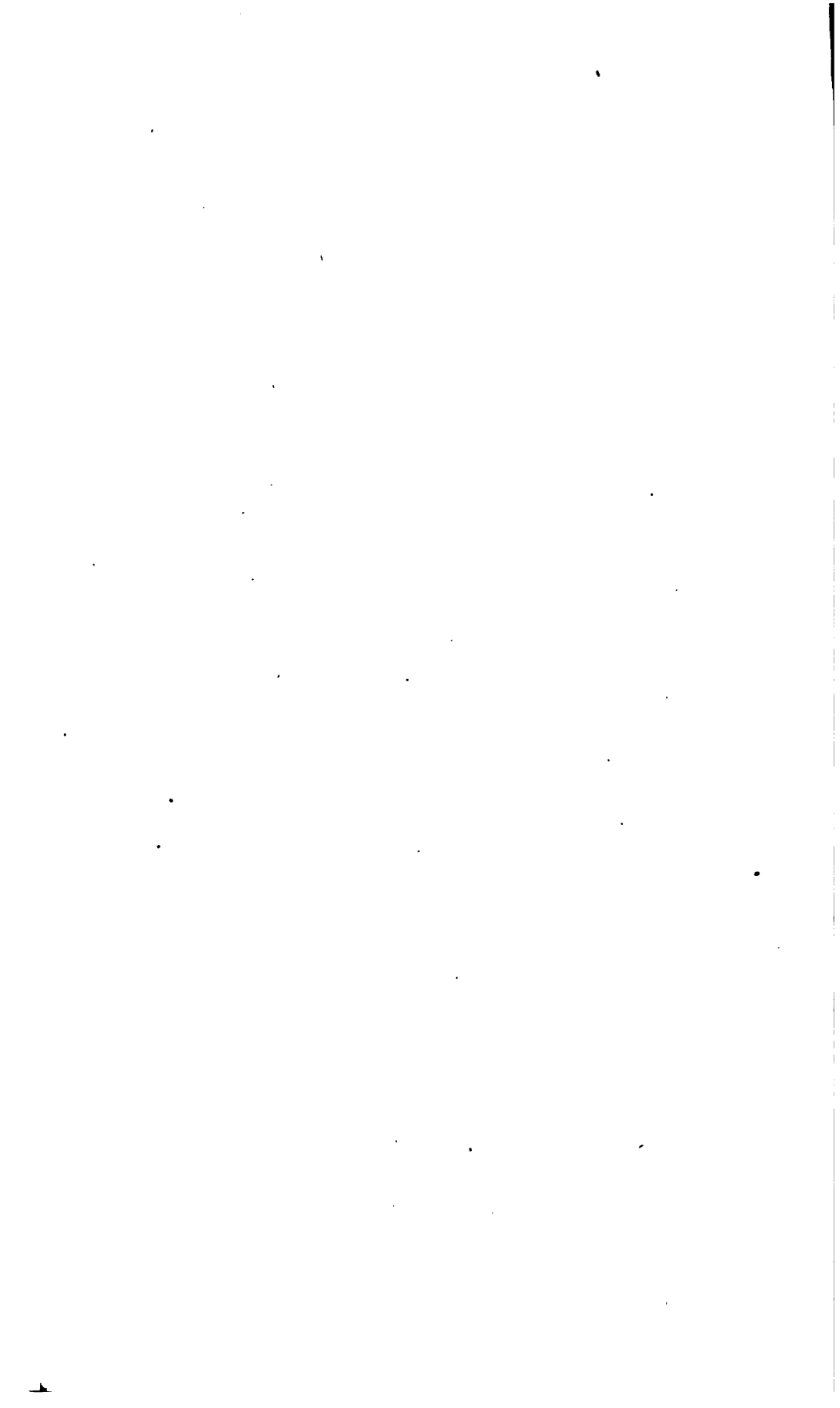
657, last line but one, for "withal" read with us.

681, line 12, *dele* "the" before counsel.

*correctly amended*

617 640







*Not Indel 30 Aug  
1823*

NEW YORK CHANCERY COURT.

*Funds of the Court of Chancery.*—On the fifth instant, when Mr. Kip transferred to his successor in office the records and funds of this Court, there were found to be within the control of that officer,

|                     |              |
|---------------------|--------------|
| In stock the sum of | \$130,472 44 |
| Bonds and mortgages | 36,475 04    |
| Cash                | 23,150 48    |

190,097 90

Of which may hereafter be called for only the sum of 181,605 62

Leaving a surplus fund belonging to the Court of 8,492 28

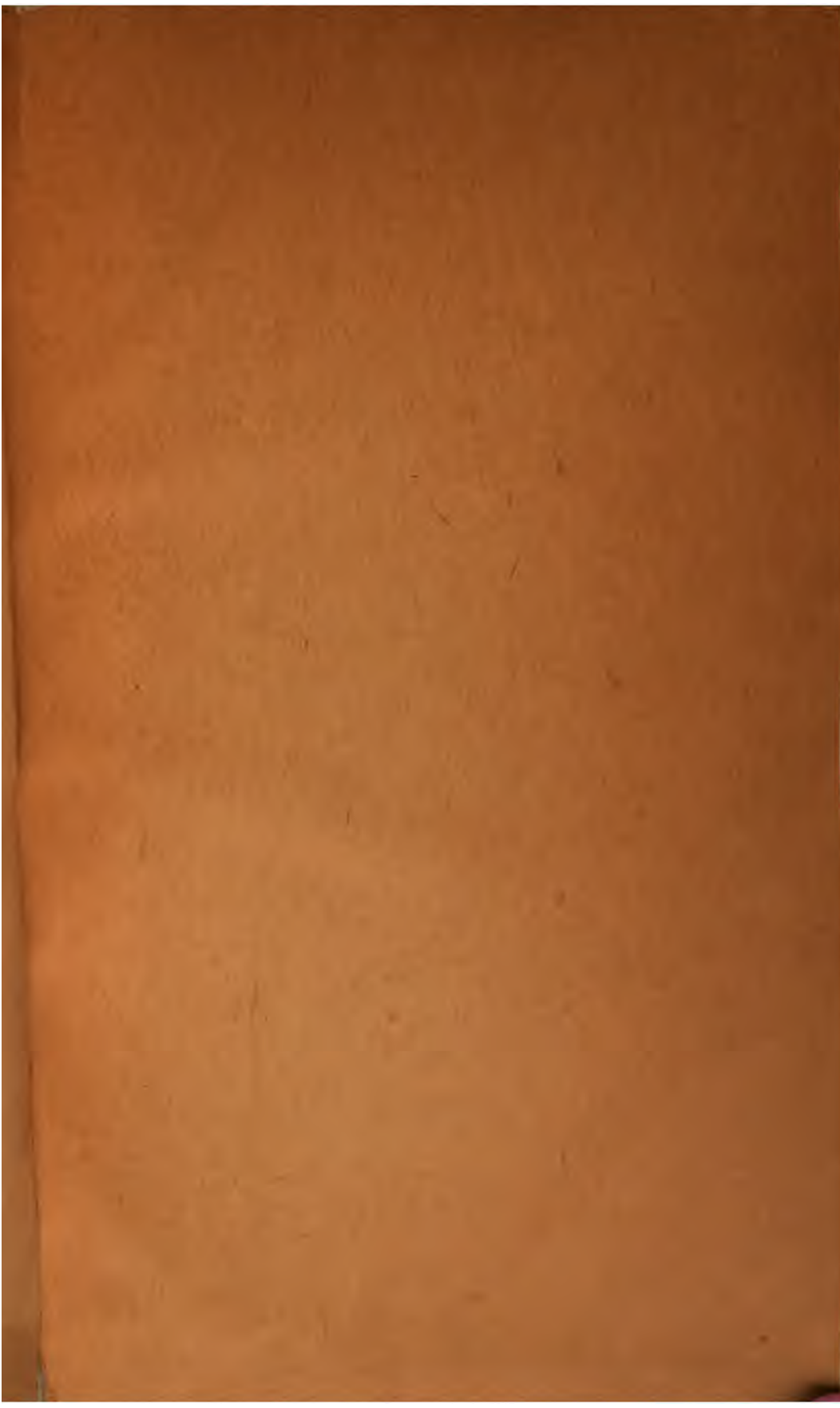
This sum, with \$1500 (heretofore paid out pursuant to the orders of the Court) making together a sum of \$10,000, has been accumulated by the judicious investments made by Mr. Kip of balances remaining from time to time in his hands.

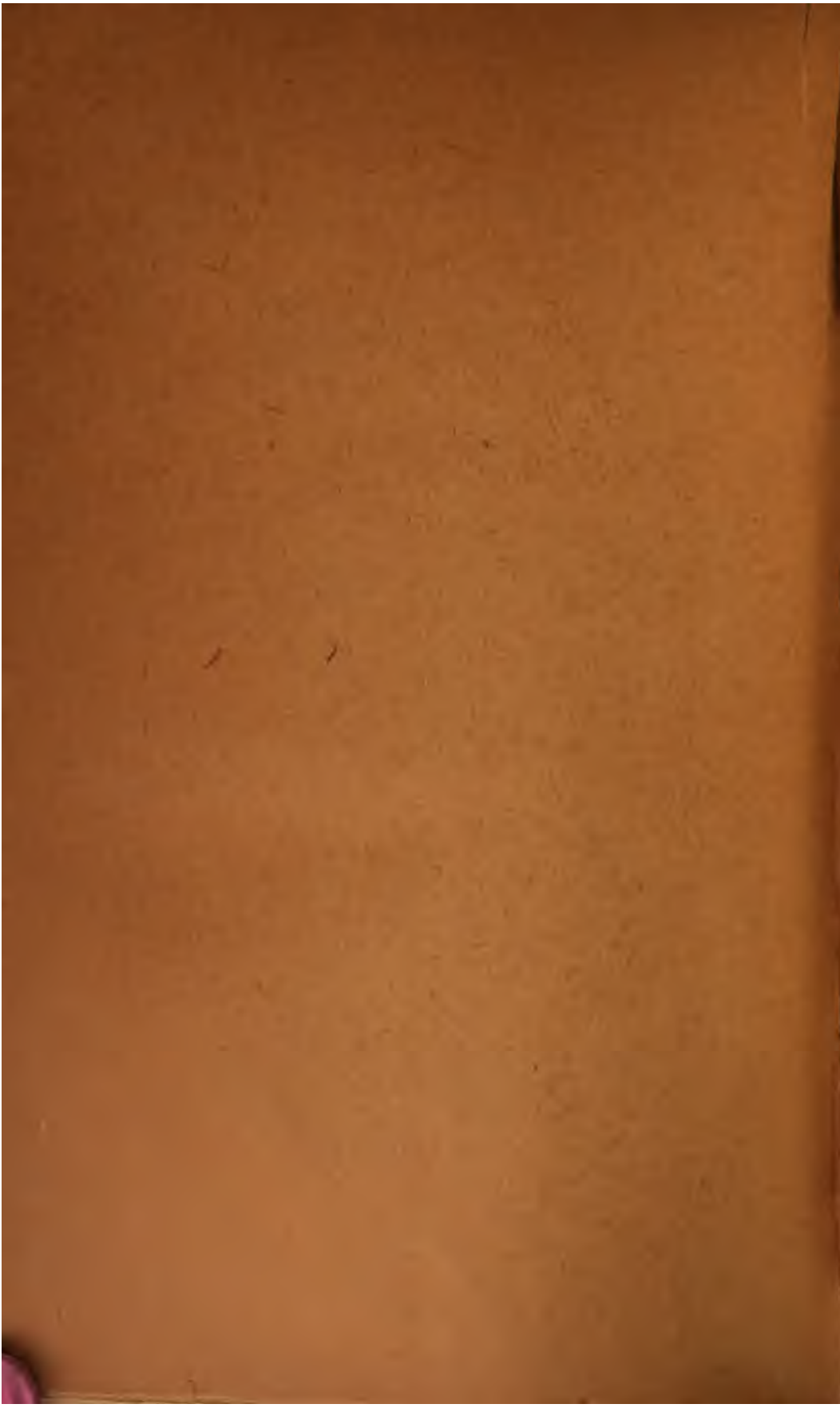
When he entered upon the duties of the office in December, 1804, there was in court the sum of about \$1700 belonging exclusively to suitors not invested; then the accounts and records of the office were all irregularity and confusion. In August, 1823, when he resigned his place, nothing could exceed the precision and clearness of its arrangement.

In retiring from office it may be said of Mr. Kip, that he has done that which we believe was never before done by any officer of any court in the world. He has paid to a successful suitor, after deducting the expenses of an extended litigation, more money than was deposited in Court.

We invite the attention to this fact of Mr. Brougham, if peradventure our paper shall ever reach his eyes, in order that he may contrast it, in the next discussion in the House of Commons on the subject, with the proceedings of the English Court of Chancery in like circumstances. He may further state, what is also a fact, and one that will startle yet more the doubting practitioners in Chancery at Westminster Hall, that, under its present organization, a suit may be carried through our Court of Chancery in less time than a suit at common law.











*Mistern & Champlin.* The great point there was, whether the assignment to them, was valid or fraudulent, and whether the plaintiffs could divert the proceeds of the property assigned, from the fair and lawful trusts created by the assignments, which were made before the plaintiff had even commenced his suit at law. I regard the law to be clearly settled, that before a judgment creditor can come here for aid against the goods and chattels of his debtor, or against any equitable interest which he may have therein, he must first take out execution, and cause it to be levied or returned, so as to show thereby, that his remedy at law fails, and that he has, also, acquired, by that act of diligence, a legal preference to the debtor's interest.

The surplus of the debtor's interest, in the present case, remained undisposed of by the debtor to whom it related, when the plaintiffs filed their bill in this Court. If they had a right to it as judgment creditors, by having sued out execution at law, and having filed their bill before any other judgment creditors had done either, that right could not be affected by a subsequent assignment of that equity by the debtor. And whether that subsequent assignment was for the benefit of the creditors in general, as it was in this case, or for the benefit of some individual creditor, cannot alter the application of the principle. It was not in the power of the debtor to withdraw that surplus from the lien so acquired, in the view of this Court, by the execution. Admitting that the plaintiffs had acquired, by their executions at law, a legal preference to the assistance of this Court, (and none but execution creditors at law are entitled to that assistance,) that preference ought not, in justice, to be taken away. Though it be the favourite policy of this Court to distribute assets equally among creditors, *pari passu*, yet, whenever a judicial preference has been established, by the superior legal diligence of any creditor, that preference is always preserved in the distribution of assets by this Court. This point appeared most abundantly in the course of the discus-

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STRONG.\* *Ante*, p. 619.

sion on the authorities in the late case of *Thompson v. Brown and others*.\* If the plaintiffs, instead of seeking merely the surplus proceeds of the ship, had charged the assignment to have been fraudulent, and had obtained a decree, setting it aside as void, it cannot be doubted but that their executions, after the impediment of the assignment was removed, would have held the whole subject assigned, in preference to other creditors who had no such executions. Instead of seeking to recover the whole value of the ship, they content themselves, in this case, with asking the aid of this Court for the surplus resulting to their debtor; and no good reason appears why their legal priority or lien should not be as available for a part, as for the whole.

It may be laid down as a rule of equity, that an execution creditor at law has a right to come here and redeem an incumbrance upon a chattel interest, in like manner as a judgment creditor at law is entitled to redeem an incumbrance upon the real estate; and the party so redeeming will be entitled, in either case, to a preference, according to his legal priority. The plaintiffs, in this case, had acquired that right of redemption when the ship *Cincinnati* was sold, by agreement, without prejudice to their rights; and instead of seeking to redeem, they are equally entitled to come here and claim the surplus.

I shall accordingly, decree, that the defendants pay to the plaintiffs the 5,400 dollars, so received by them in trust, in September, 1809; and that it be referred to a master to inquire and report what disposition was made, of that money by the defendants, and whether it was kept in bank by itself, or was mingled with their own moneys, and employed in like manner; that he compute interest on that sum, from the time it was paid to the defendants, up to the date of his report, reserving, however, the question of interest, until the coming in of the report; and that the said moneys to be paid by the defendants, if not sufficient to satisfy the judgments of the plaintiffs, with interest on those judgments,

for the real sum recovered and due, including their costs of those judgments and of this suit, be paid to all of them rateably, in proportion to the amount due to each of them respectively, as aforesaid; and that the money be paid to the solicitor for the plaintiffs, for the purpose of such distribution.

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Decree accordingly.(a)

(a) Vide *Brinkerhoff v. Brown*, ante, 671. and *Williams v. Brown*, ante, 682.

R. K. ALLEN and THORP against RANDOLPH and others.

A plea must be perfect in itself, so that if true in fact, it will put an end to the cause.

If circumstances of fraud are charged in the bill, they must be denied by a general averment, at least.

Where the bill charged misrepresentation, coercion, and fraud, in procuring a release of a debt, and the defendant put in a plea and answer; and in his plea, insisted on the release in bar, without noticing the allegation of fraud, though in the answer it was fully answered and denied, the plea was held bad.

Where A. assigned and made over to S. a debt and demand against R., and the proceeds of goods delivered by A. to R. to sell on account: Held, that all the right and interest of A., as the creditor of R., passed by the assignment, and that a release of all demands in law and equity by S. to R., as assignee, given on a compromise with him, was valid and effectual.

THE bill stated, among other things, that the plaintiff and D. K. Allen, were partners in trade, under the firm of R. & D. K. Allen, and became insolvent on the 16th of April, 1818. That D. K. A., being arrested and imprisoned, applied for his discharge under the 9th section of the insolvent act, and having assigned his estate to the plaintiff, Thorp, according to the act, was, on the 16th of December, 1818, discharged from his debts. That before their failure, R. & D. K. Allen, delivered to the defendants, Randolph &

Dec. 28th.

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*Savage*, various parcels of goods, at various times, to be shipped to different places, and sold for their account, all of which were particularly stated in the bill, and amounting to above 30,000 dollars; and the bill charged, that the defendants, *R. & S.*, had never accounted for the proceeds of the goods or moneys received by them, to *R. & D. K. A.*, before the assignment and discharge of *D. K. A.*, nor to the plaintiffs, *A.* and *T.*, since. That before their failure, *R. & D. K. A.*, being indebted to the defendant *S.*, by bond, for 9,964 dollars, and to *D. A.* for moneys lent to them, the said *D. A.* being also responsible for a demand of one *F. A. T.* against them, for 10,000 dollars, they, on the 13th of May, 1818, assigned to the defendant, *Skidmore*, among other things, the debt or demand of the said *R. & D. K. A.* against the defendants, *Randolph & Savage*, and the proceeds of the goods so delivered to them as aforesaid, in trust to recover and collect the same, and by means thereof, to pay the moneys due to him, the said *Skidmore*, and to *David A.*, &c. and to indemnify *David A.*, &c. and to pay the residue or surplus to *R. & D. K. A.*, their executors, administrators or assigns.

The bill stated, that *Randolph & Savage* refused to account to *Skidmore*, and being pressed by him for payment, offered to pay 2,000 dollars on account of the demand, and give their notes for 2,000 dollars more, if *S.* would discharge them; and that if *S.* would not accept that offer, they would not pay any thing. That *Skidmore*, apprehensive of the insolvency of *R. & S.*, thought it prudent to accept the offer; and on the 7th of April, 1819, *R. & S.*, accordingly, paid the 2,000 dollars, and gave three notes, payable in 30, 60, and 90 days, for the other 2,000 dollars. The first and second notes were paid, but *R. & S.* failed before the third fell due, and compounded with all, or most of their creditors. That before the money and notes were delivered, *Skidmore*, as assignee, &c. executed a discharge or release, to *Randolph & Savage*, and delivered to them the book of



# CASES IN CHANCERY.

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account kept by *R. & D. K. A.* of all the goods, &c. which release, &c. was insisted on by *R. & S.* as a condition precedent to their paying the 4,000 dollars. The bill charged, that this discharge and release were obtained by the defendants *R. & S.* from *Skidmore*, by misrepresentation, coercion and fraud; that they could not avail themselves of it; and that *Skidmore* had no authority or power to give it, except upon a fair and full settlement of the account with *R. & S.*, &c. *Prayer*, that the defendants, *R. & S.*, may be decreed to come to an account with the plaintiffs, for the goods so delivered to them, or for the proceeds thereof, and to pay to the plaintiffs what should be found due to them, and that the defendant, *Skidmore*, account for the moneys he has received, and for general relief.

The defendants, *Randolph & Savage*, put in their *plea* and *answer*, on the 15th of *September*, 1820. They pleaded, after protesting, &c. that before the filing of the bill, &c. to wit, on the 7th of *April*, 1819, *Skidmore*, as assignee, &c. by his deed of release, in consideration of 4,000 dollars, released and discharged them from all demands in law or equity, by means of the said assignment, and prayed judgment, &c. The plea was silent as to the allegations of misrepresentation and fraud, but the same were fully denied and repelled in the answer.

*T. A. Emmet* and *M. C. C.*, for the defendants, in support of the *plea* and answer.

*J. Radcliff*, contra.

THE CHANCELLOR. The first objection to the plea is, that *Skidmore*, the assignee of *R. & D. K. Allen*, had no authority to compromise or compound with the defendants *Randolph & Savage*, as to the demand assigned to him. I do not perceive the force of this objection. *Skidmore* was not a mere agent to collect the debt of the *Allens*. The

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bill states that they did, by an assignment delivered to *Skidmore*, "assign and make over to him their debt or demand in the bill stated, against *R. & S.*, and the proceeds of the goods delivered." This deed or writing passed their right and interest as creditors of *R. & S.*; and the debtors had a right to treat with *Skidmore*, and deal with him as the real owner. The trusts raised by the assignment applied to the debt or proceeds which should come into his hands, and *R. & S.* had no concern with those trusts. They could not safely deal with any other person than the assignee of the demand; any settlement they might make with him, if made in good faith, and not by fraud or collusion with him, was valid and binding. The release or discharge given by the assignee, upon the settlement, was one that he was competent to give, and they to receive. It discharged them from "all demands in law and equity by means of the assignment." It was, therefore, co-extensive with the debt and demand which passed by the assignment.

The only real difficulty in this case is, that there is no general averment in the plea denying the charges in the bill, which, if true, would avoid the plea. The bill charges that the release was procured by misrepresentation, coercion, and fraud; and though this charge is denied in the answer accompanying the plea, there is not even a general averment to that effect in the plea. The release is pleaded nakedly, as was the award in the two Exchequer cases of *Pope v. Bish* and *Edmundson v. Heartly*. (1 *Ans.* 59. 97.) But in the latter of those cases, the Court said, they did not mean to extend the authority of them beyond the case of awards. In *Lloyd v. Smith*, (1 *Ans.* 258.) afterwards, in the same Court, such a naked plea of a release charged by the bill to have been procured by fraud, was not allowed, in the first instance, but reserved to the hearing. In *Bayley v. Adams*, (6 *Vesey*, 586.) the authority of those cases was very much shaken; and it seemed to be considered by Lord *Eldon* as the better rule, that

the charges in the bill must be met by way of general averment in the plea, as well as particularly in the answer. The rule is so laid down in *Mitf. Tr.* 218. ; and the decision in *Davie v. Chester*, in Chancery, in 1780, is referred to, as containing a decision directly to the point. The sense of the rule is, that a plea must be perfect in itself, so that, if true in point of fact, there may be an end of the cause. But if the circumstances of fraud under which the release is charged to have been procured, be not denied in the plea, it may be true that such a release was given, and yet this may be of no effect.

I shall, therefore, as was done in the Exchequer cases, and as Lord *Eldon* consented to in *Bayley v. Adams*, allow the defendant to amend his plea ; the amendment to be by inserting a general averment or denial of the facts charged in the bill, which go to show that the release was fraudulently or improperly procured. The amendment to be made in three weeks after service of a copy of this rule, and a copy served *gratis* on the solicitor for the plaintiff ; and in default thereof, the plea to be deemed overruled, and with liberty to the plaintiffs to except to the answer of the defendant, *Randolph*, the survivor of *R. & S.*

As the cause was brought to a hearing, not only on the defect in the plea, but on the merits of the defence touching the competency of *Skidmore* to execute a release, I shall not grant costs upon this order, but reserve the question of costs to the conclusion of the cause.

Decree accordingly.

END OF THE CASES.

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## ORDER OF COURT.

*June 21st, 1820.*

“ ORDERED, That the stated terms of this Court shall hereafter be held on the fourth *Mondays* of *May* and *October*, in the city of *New-York*; and on the fourth *Mondays* of *March* and *August*, in the city of *Albany*; and that the 86th rule of this Court be, and the same is, hereby repealed; and that the term of *March* be substituted for the term of *January*, mentioned in the 80th rule.”

# INDEX.



## A.

### ACCOUNT.

*Vide* EXECUTOR AND ADMINISTRATOR.  
DEVISE, 2. 5. 7. PLEADING, VI.  
PRACTICE, XI. TRUST AND TRUSTEE, III.

### ADMINISTRATION.

*Vide* EXECUTOR AND ADMINISTRATOR.

### ADMINISTRATOR.

*Vide* EXECUTOR AND ADMINISTRATOR.

### ADULTERY.

*Vide* BARON AND FEME, 2.

### AGENT.

*Vide* SOLICITOR AND ATTORNEY.  
PRACTICE, XIV. VENDOR AND PURCHASER, 3. 5.

### AGREEMENT.

- I. *Construction, effect, waiver, and rescinding of an agreement.*
  - II. *Specific performance.*
- I. *Construction, effect, waiver, and rescinding of an agreement.*
  1. An agreement for a lease pre-

sumed, from length of time, and possession and payment of rent by the tenant; and the landlord decreed, accordingly, to execute a lease in fee to the tenant, with the usual covenants contained in such leases of the lands in the same tract or manor. *Ham v. Schuyler*, 1

2. Equity will not force a mere voluntary agreement, not valid at law, especially against a legal claim for a just debt, and where there is no consideration, accident, or fraud. *Minturn v. Seymour*, 497

### II. *Specific performance.*

3. On a contract for the sale of land, the payment of the purchase money by the plaintiff, was made a condition precedent to the conveyance; and after a default the defendant accepted part of the purchase money; but the plaintiff, though repeatedly called upon, refused to complete the payment. The defendant, after giving notice of his intention to do so, sold and conveyed the land to another; and the plaintiff, afterwards, tendered the money due on the contract, and filed his bill for a

specific performance of the contract: *Held*, that a specific performance could not be decreed; nor could the bill be sustained for a compensation in damages. *Hatch v. Cobb*, 559

4. It *seems*, that even if the defendant had not sold the land to another, before the plaintiff filed his bill, he would not, after such default and delay, on his part, be entitled to a specific performance, as no accident, mistake, or fraud, had intervened, to prevent the performance on his part. *ib.*

*Vide* LACHES, LENGTH OF TIME AND POSSESSION, 1. 4. 5. INJUNCTION, 1. 4. III. 9. FRAUD, 3. AWARD. BAILMENT. DIVORCE, 5. JURISDICTION, 11.

#### ALIMONY.

*Vide* DIVORCE, 2.

#### AMENDMENT.

*Vide* PRACTICE, V.

#### ANSWER.

*Vide* PLAEDING, VI.

#### APPEARANCE.

*Vide* PRACTICE, VI.

#### ASSESSMENTS.

*Vide* JURISDICTION, 5, 6.

#### ASSETS.

1. A devise of all a creditor's estate real and personal, in *trust*, to pay debts and to distribute the residue, places the assets under the jurisdiction of this Court. *Benson v. Le Roy*. 651

2. The statute, *sess.* 36. *ch.* 93. (1 *N. R. L.* 316.) does not interfere with the doctrine of equitable assets, by which all the creditors are to be paid *pari passu*; for the omission of the 4th section, or proviso of the *English* statute, (3 *W. & M.* c. 14.) which excepted devises of lands for the payment of debts, does not vary the construction. *ib.*

*Vide* EXECUTOR AND ADMINISTRATOR, 3. 5, 6, 7, 8. 9, 10, 11, 12, 14, 15. JURISDICTION, 15, 16. 30.

#### ASSIGNMENT.

Where *A.* assigned and made over to *S.* a debt and demand against *R.* and also the proceeds of goods delivered by *A.* to *R.* to sell on account; *Held*, that all the right and interest of *A.*, as creditor of *R.*, passed by the assignment; and that a release of all demands in law and equity by *S.* to *R.*, as assignee, given on a compromise with him, was valid and effectual. *Allen v. Randolph*. 693

*Vide* INSOLVENT DEBTOR, 1, 2. DEBTOR AND CREDITOR, 3, 4, 5. SHIP OWNERS, 1, 2. PARTNERSHIP, 3, 4, 5. BANKRUPT, 6. FOREIGN LAWS, 1, 2, 4, 5. FRAUDULENT CONVEYANCES, 3.

#### ATTACHMENT.

*Vide* PRACTICE, I. 1, 2, 3.

#### AUCTION.

*Vide* FRAUDULENT CONVEYANCES, 5, 6. VENDOR AND PURCHASER, 3. 5, 6.

## AWARD.

1. This Court will correct a *mistake* of an extra judicial nature, in an award of arbitrators, and decree a performance of it *in specie*. *Bouk v. Wilber*, 405
2. As where the subject of controversy was land which the arbitrators were to appraise, and the plaintiff was to convey the same to the defendant who was to pay the amount of the appraisal, and the arbitrators, by a mere clerical mistake, so erroneously described the land in the award, as to include *one* acre only, instead of fifty acres, it was decreed that the award be corrected according to the truth of the fact; and that there be a specific performance of it accordingly. *ib.*

## B.

## BAILMENT.

The defendants, being stock and exchange brokers, in the course of their business, received of the plaintiff 430 shares of *United States* bank stock, and which, it was agreed, in *February*, 1818, that they should hold as collateral security for the payment of a note given to them by the plaintiff, for monies advanced to him, and payable on the *20th January*, 1819; and that they should be at liberty, in case the note was not paid, at the time, to make immediate sale of the stock, accounting to the plaintiff, for any surplus, and holding him responsible for any deficiency: *Held*, that as the defendants, at all times, since the giving of the note by

the plaintiff, were possessed of shares standing in their names, and under their absolute and rightful control, and subject to no contract, to an amount far exceeding the number of shares deposited with them by the plaintiff, (and which were not marked or identified as his particular property but blended with the mass of shares of the same stock held and owned by the defendants) and were ready and able, at any time, to transfer the 430 shares to the plaintiff, on payment of the note, they were not bound to account to the plaintiff for his stock, at the *highest price* at which shares were sold by them, at any time during that period; but that the like number of shares held by the defendants when the note became due, were to be considered as the shares so deposited by the plaintiff; and which the defendants were at liberty to sell, according to the agreement, to reimburse the amount of the note which remained unpaid. *Nourse v. Prime*, 490

## BANKRUPT.

1. It is a principle of international law, to take notice of and give effect to the title of foreign assignees; and assignees of a foreign bankrupt may sue here for debts due to the bankrupt's estate, either as such assignees, or in the name of the bankrupt. *Holmes v. Remsen*, 460
2. The same principle of general law, that governs marriage contracts, testamentary dispositions, and the succession to the personal estate of an intestate,

applies to the distribution of the estate of a foreign bankrupt. 460

3. The principle of international law on this subject, is a rule of decision, not a question of jurisdiction ; and does not affect the rights of territorial sovereignty. *ib.*
4. But the title of the foreign assignees takes effect only from the date of the assignment to them, and has no relation to the time of the bankruptcy committed. *ib.*
5. For the doctrine of *relation*, in regard to bankrupts, is a positive rule of mere municipal policy ; and the rule of *comity* between nations does not require its adoption. *ib.*
6. Therefore, an assignment by the commissioners of bankrupts, in *England*, of all the estate and *chooses in action* of the bankrupt, passes a *debt* due by a citizen of this state to the *English* bankrupt. *ib.*
7. And if such assignment is prior in time to an attachment of the same debt here, at the instance of an *American* creditor of the bankrupt, issued under the act for relief against absent debtors, &c. a subsequent payment of the debt to the foreign assignees in *England*, is a bar to a suit brought here by the *trustees* under the act, against the debtor here. *ib.*
8. A concurrent separate assignment made by the foreign bankrupt to the same assignees, on the same trusts, though it may strengthen the case before the Court, makes no difference in the application of the general doctrine. *ib.*
9. The effect is the same whether

the transfer is made by himself, or by the law of the place of his domicile, for him. 460

#### BARON AND FEME.

1. This Court will lay hold of the property of a wife, which may be within its power, for the purpose of providing a maintenance for her, when she is abandoned by her husband, or prevented by his ill treatment from cohabiting with him. *Dumond v. Magee*, 318
2. Where a husband abandoned his wife, and married another woman, with whom he continued to live, for twenty years, he was held to have forfeited all just claim to his wife's distributive share to personal estate inherited by her. *ib.*
3. And the Court directed the principal of the wife's share to be brought into Court, and placed at interest ; and, after her death, the principal to go to her children, by her lawful husband, or to their representatives : she having, after being abandoned by her husband, upon report and belief of his death, married another. *ib.*

#### *Vide* DIVORCE.

#### BILL.

#### *Vide* PLEADINGS, III.

#### BOND.

The penalty of a bond cannot be made to cover any other debt or demand than that mentioned in the condition. *Troup v. Wood and Sherwood*, 228



## C.

## CIVILITER MORTUUS.

A person convicted of felony, and sentenced to imprisonment in the state prison for life, is *civiliter mortuus*. *Troup v. Wood and Sherwood*, 228

## COLLATERAL SECURITY.

*Vide* MORTGAGE, II. 6.

## CONSTITUTION OF THE UNITED STATES.

1. Under the Constitution of the United States, citizens of each state are entitled to free ingress and egress to and from any other state, and to all the immunities of citizens in every state. *Livingston v. Tompkins*, 430
2. The government of the United States having sole and exclusive jurisdiction over all differences between two or more states, all acts of reprisal between the states are unnecessary and unlawful. *ib.*

## CONSTITUTION OF NEW-YORK.

*Vide* STEAM BOATS, 1.

## CONTEMPT.

*Vide* PRACTICE, I. XIII. 48, 49.

## CONTRACT.

*Vide* AGREEMENT.

## CONTRIBUTION.

1. The doctrine of contribution is not so much founded on contract, as on the principle of

equity and justice, that where the interest is common, the burden also should be common; and the principle, that equality of right requires equality of burden, has a more extensive and effectual operation in a court of equity, than in a court of law. *Campbell v. Messier*, 334

2. Thus, where there was an old party wall between two owners of houses, in the city of New-York, and one of them being desirous to build a new house on his lot, pulled down his old house, and with it the party wall, which was ruinous, and rebuilt it with his new house, the owner of the contiguous house and lot is bound to contribute rateably to the cost of the new party wall. *ib.*
3. He is not, however, bound to contribute to building the new wall higher than the old; nor, if materials more costly, or of a different nature, are used in it, is he bound to pay any part of the extra expense. *ib.*
4. Where, in a bill filed by a mortgagor, to redeem, against the administrators of a mortgagee in possession, and others claiming under him, the defendants were decreed to pay a certain sum for the *rents and profits* of the land, after deducting the mortgage debt; and the decree being silent as to the proportion which each defendant was to pay, one of the defendants paid the whole, and the plaintiff gave him liberty to make use of the decree to reimburse himself: *Held*, that he could use the decree only for his protection and indemnity, so far as his co-defendants were bound to contribute. *Scribner v. Hickok and others*, 530

5. And the court, on petition and motion of a co-defendant, directed the contribution to be enforced under the decree, so far only as the right was clearly ascertained. *ib.*
6. A defendant who has made payments for his co-defendant towards satisfying a prior mortgage, and beyond his proportion of the burden, is to be deemed substituted for the plaintiff, to that extent, and as far as the fact appears from the proceedings in the cause. *Lawrence v. Cornell,* 545

*Vide Dower, 3.*

### CORPORATIONS.

1. A foreign corporation, or an incorporated bank of another state, may sue in their corporate name, and file a bill for the sale of land in this state, under a mortgage taken to secure money lent. *Silver Lake Bank v. North,* 370
2. If the loan and the mortgage were concurrent acts, it is within the reason and spirit of the act of incorporation by which the corporation is authorized to take mortgages, &c. for the security of debts previously contracted. *ib.*
3. But it seems, that this court will not, in a collateral way, decide a question of *misuser* of a charter, by setting aside a *bona fide* contract. *ib.*
4. If an incorporated bank of another state lends money, and takes a mortgage in this state, it is not a violation of the act of the legislature of this state, passed April 21, 1818, relative to banks, &c. (*sess. 36. ch. 71.*) for restraining unincorporated associations from carrying on banking business. *ib.*
5. In private unincorporated associations of individuals, the majority cannot bind the minority, unless by special agreement. *Livingston v. Lynch,* 573

### COSTS.

1. A defendant who answered an original bill, after a decree against him, petitioned for a *re-hearing*, which was granted, and the plaintiffs filed a bill of *revivor and supplement*, to which the defendant answered and disclaimed; he was held not to be entitled to costs, on the dismissal of the bill. *Shaver v. Radley,* 310
2. On the dismissal of the bill costs were denied to the defendants, on the ground of *laches* on their part, and hardship on the part of the plaintiffs. *ib.*
3. Where the defendant set up a judgment and a mortgage, which judgment was proved to have been satisfied, and claimed more than was due on the mortgage, he was held not to be entitled to costs against the plaintiff. *Brinkerhoff v. Lansing,* 65, 79
4. And the plaintiff, though he succeeded in disproving the claim of the defendant, but failed in supporting his charge that the mortgage was also satisfied, and fraudulently kept on foot, was held not entitled to costs. *ib.*
5. A defendant who had no interest in the controversy, and was not a necessary party, but united with the other defendants in setting up a defence which was not true, was held not entitled to costs; though they would have been otherwise allowed to him. *ib.*

6. Costs not allowed to either party, on a bill for a perpetual injunction to quiet the possession. *De Riemer v. Cantillon*, 86. 93
7. Costs awarded on a decree correcting a mistake in a contract, in a bill for that purpose, and for specific performance. *Keiselbrack v. Livingston*, 144
8. On a bill for discovery merely, the defendant is entitled to costs. *Burnet v. Sanders*, 503
9. But where the plaintiff, who is entitled to discovery, goes first to the defendant, and asks for the information sought, which, though in the power of the defendant to give, is refused; and the plaintiff is, therefore, compelled to file a bill against the defendant, to obtain the discovery, and he answers fully, he will not be entitled to costs. *ib.*
10. Where a plaintiff asked for further time to except to the answer, which was granted; and, also, for leave to amend his bill after such answer, and after a plea accompanying it, but not noticed for argument; the plaintiff, on being allowed to amend his bill, was ordered to pay *five dollars*, for the *extra* costs of the further answer, and the *taxable* costs of the plea, in case it should become useless, in consequence of the bill being amended. *French v. Shotwell*, 505
11. Where the will of the testator is so ambiguously expressed, as to render it proper for the executor to take the direction of the court, the costs will be ordered to be paid out of the fund in controversy. *Rogers v. Ross*, 608

*Vide* DOWER, 4. IDIOTS AND LUNATICS, 1, 2.

## CREDITOR.

*Vide* DEBTOR AND CREDITOR.

## D.

## DEBTOR AND CREDITOR.

1. If one judgment creditor has a right to go upon two funds, and a second judgment creditor upon one of them, belonging to the same debtor, the former may be compelled to apply first to the fund not reached by the second judgment, so that both judgments may be satisfied. *Dorr v. Shaw*, 17
2. But if the first creditor has a judgment against A. and B., and the second creditor against B. only, the latter cannot compel the former to take the land of A. only; it not appearing whether A. or B. ought to pay the debt due to the first creditor; nor any equitable right shown in B. to have the debt charged on A. alone. *ib.*
3. An assignment by a debtor of "all his estate, real and personal, and of all books, vouchers and securities relative thereto," in trust, for the benefit of all his creditors, passes all his estate and interest, equitable and legal; and, therefore, includes stock of the United States, before voluntarily assigned by the debtor, when insolvent, in trust, for the benefit of his wife and children; and the trustees under the voluntary settlement were decreed to hold the stock subject to the order and disposition of the trustees under the general assignment. *Bayard v. Hoffman*, 450

4. An assignment by a debtor to trustees for the benefit of all his creditors, is valid, without the previous assent of the creditors. *Nicoll v. Mumford*, 522
5. But where the assignment is made directly to the creditors, without the intervention of trustees, the assent of the creditors is requisite to give validity to the deed of assignment. *ib.*
6. A suit by one creditor against an heir, and a decree for the sale of the assets descended, will enure for the benefit of all the creditors, and draw the distribution of the assets to this court. *Thompson v. Brown*, 619
7. So, also, in the case of executors and administrators. *ib.*
8. If a creditor seeks the aid of this court, against the real estate of his debtor, he must first show a judgment at law, creating a lien on such estate; and if he seeks aid in regard to the personal estate, he must show an execution, giving him a legal preference, or lien on the goods and chattels, which he has pursued to every available extent at law. *Brinkerhoff v. Brown*, 671
- S. P. Williams v. Brown*, 682
- S. P. M'Dermut v. Strong*, 687
9. This court, as well as a court of law, allows a creditor to give a preference to one debtor over another. *Williams v. Brown*, 682
10. As, where a debtor in insolvent circumstances, confesses a judgment in favour of a particular creditor, for a debt justly due, the judgment creditor will retain his priority. *ib.*
11. If, however, the debtor makes use of the judgment so confessed, for his own purpose, to effect a sale and change of the property, and it is sold at a great sacrifice, and purchased in by him, this court will allow it to be redeemed, or to be set up again, at the price at which it was sold, and resold for the benefit of the other creditors, as to any surplus beyond that price. *ib.*
12. This court assists a judgment creditor to discover and reach the property of a debtor, which is beyond the reach of an execution at law. *M'Dermut v. Strong*, 687
13. A judgment creditor who has taken out execution at law, and had it levied and returned, but has failed in obtaining satisfaction at law, or to reach a residuary trust interest in the chattels of his debtor, and files his bill for the aid of this court, gains, by his legal diligence, a legal preference to the assistance of this court, which cannot be affected or impaired by any subsequent assignment of that equity, by the debtor, either for the benefit of all his creditors generally, as under the insolvent act, or for the benefit of a particular creditor. *ib.*
14. Though it is the favourite policy of this court, to distribute the assets of a debtor equally among all his creditors, *pari passu*; yet when such a judicial preference has been established by the superior legal diligence of any creditor, that preference will be preserved, in the distribution of the assets. *ib.*

*Vide JURISDICTION. EXECUTOR AND ADMINISTRATOR.*

### DECREE.

*Vide* PRACTICE, XII. INFANT.

### DEED.

Where a sheriff's deed, by mistake, did not include all the parcel of land or whole premises, advertised and intended to be sold, and the defendant, and all parties, supposed the deed comprised the whole, and the purchaser bid and paid a price accordingly; the defendant was perpetually enjoined from prosecuting an ejectment at law, to recover the part not included in the deed, and was decreed to release to the plaintiff all his right and title to the same. *De Riemer v. Contillon*, 85

### DEFAULT.

*Vide* PRACTICE, VI. 22. XII. 40. 45.

### DEMURRER.

*Vide* PLEADINGS, V.

### DEVISE.

1. A testator possessed of a large real and personal estate, bequeathed to his wife his household furniture, &c. and "her comfortable support and maintenance out of his estate, to be, from time to time, rendered and paid to her by his executors, and the use of one room in his dwelling house, during all such time as she should continue to be his widow, and no longer," and devised the rest of his estate to his children: *Held*, that though the charge of a comfortable support and maintenance

might fall on the real as well as the personal estate; it did not affect the widow's right of dower, there being nothing inconsistent in the two claims, and no express declaration of the testator on the subject; and that, therefore, the widow was not to be put to her election. *Smith v. Kniskern*, 9

2. By a devise of *all the rest and residue of the real estate of the testator, the rents and profits, from the testator's death to the time of vesting the estate, will pass; and whoever takes the legal estate in the mean time, will be answerable for the profits.* *Rogers v. Ross*, 388
3. The rents and profits, as well as the estate itself, may be given, by way of *executory devise.* *ib.*
4. The heir at law may be considered as a *trustee*, when it is necessary to carry the intention of the testator into effect. *ib.*
5. The rents and profits may accumulate in the hands of the heir at law, for the benefit of the executory devisee, until the vesting of the estate. *ib.*
6. Or the court may, if necessary, appoint a *receiver* of the rents and profits, for that purpose. *ib.*
7. Where the executory devisee was illegitimate, and it did not appear that the testator had any lawful heir, and no person appeared to claim the inheritance, the *executor* of the testator who had taken possession of the real estate, and was appointed guardian of the executory devisee, and received the rents and profits from the death of the testator to the happening of the event on which the estate was to vest, was held accountable

for them to the executory devisee. *ib.*

8. A devise of all the testator's estate, real and personal, in trust, to pay debts, and then to distribute the residue, places the assets under the jurisdiction of this court. *Benson v. Le Roy*, 651

### DISCOVERY.

*Vide* PLEADINGS, III. 11, 12, 13, 14.

### DISTRIBUTION OF ASSETS.

*Vide* ASSETS. EXECUTOR AND ADMINISTRATOR. JURISDICTION. DEBTOR AND CREDITOR.

### DIVORCE.

1. Where a divorce, a *mensu et thoro*, for cruel and inhuman treatment of the wife, by the husband, is decreed, the separation will be made *perpetual*, with a *proviso* that the parties may, at any time, by their mutual and voluntary act, apply to the Court for leave to be discharged from the decree. *Barrere v. Barrere*, 187
2. The wife, under the circumstances of the case, was allowed to retain the custody of an infant son, subject to the future order and direction of the Court; and the husband was directed to pay a certain sum for the support of his wife and child, and the costs of the suit. *ib.*
3. A husband cannot file a bill against his wife for a divorce *a mensa et thoro*, on the ground of cruelty, desertion, or improper conduct. *Van Feghten v. Van Feghten*, 501
4. So that, if in an answer to a bill

filed by the wife against the husband for a divorce, under the statute, on the ground of cruel treatment, the husband denies the charge, and sets up acts of cruel and abusive treatment on the part of the wife, and asks for a divorce, the bill will be dismissed. *ib.*

5. The Court will not take notice of any consent or agreement of the parties, to a divorce *a mensa et thoro*. *ib.*

### DOWER.

1. Where a testator, possessed of real and personal estate, devised to his wife his household furniture, &c. and a "comfortable support and maintenance out of his estate, to be, from time to time, rendered and paid to her by his executors," &c. *Held*, that though the charge of a comfortable support and maintenance might fall upon the real as well as the personal estate; yet, there being no express declaration of the testator on the subject, nor any thing inconsistent in the two claims, it did not affect the widow's right of dower, and she was not, therefore, to be put to her election. *Smith v. Kniskern*, 9
2. On a bill for dower, the widow was held entitled to the value of the *mesne profits* arising from the use of the undivided third of the premises of which her husband died seised, from the death of her husband, exclusive of the improvements since made thereon. *Hazen v. Thurbur*, 604
3. And there being several heirs and terre-tenants, the amount was directed to be assessed

- upon them, respectively, according to the time of their enjoyment of the premises. *ib.*
4. But as the widow had never claimed her dower, and there was no opposition or vexation on the part of the defendants, costs were denied her. *ib.*

## E.

### ELECTION.

Where the plaintiff brings a suit at law, and obtains a judgment, and at the same time files his bill against the defendant in this court, for the same matter, he will be put to his election, either to proceed at law or in this court; and if he elect to proceed at law, his bill will be dismissed; but if he elects to proceed in this court, he will be enjoined from proceeding under the judgment, without the leave of this court. *Rogers v. Vosburgh*, 84

*Vide DOWER, 1.*

### EQUITABLE ESTATE.

*Vide MORTGAGE, I. JURISDICTION, 28, 27. 29.*

### EQUITY OF REDEMPTION.

*Vide MORTGAGE, III.*

### EVIDENCE.

*Parol Evidence to explain, vary, or contradict written instruments.*

1. Parol proof is admissible to correct a mistake in a written contract, in favour of the plaintiff

seeking a specific performance of that contract; especially, where the contract, in the first instance, is imperfect without referring to facts *aliunde*. *Keisselbrack v. Livingston*, 144

2. As, where there was an agreement to execute a lease for three lives, "containing the usual clauses, restrictions, and reservations contained in leases given by the defendant;" it being necessary, by proof *dehors* the agreement, to ascertain what were the usual clauses, &c. in such a lease; it was held to be open to the plaintiff, also, to show, by parol evidence, that it was agreed and understood, at the time, that a particular reservation was not to be inserted in the lease which the defendant was to execute. *ib.*
3. Parol proof to correct a mistake in a contract is admissible, as well in favour of the plaintiff, as the defendant. *ib.*
4. Parol evidence is admissible to show that a mortgage only, not an absolute sale, was intended; and that the defendant had fraudulently attempted to convert the loan into a sale. *Strong v. Stewart*, 167

*Vide LACRES, LENGTH OF TIME AND POSSESSION.*

### EXCEPTIONS.

In Answer, *vide PRACTICE, XI. 35, 36.*

To Master's Report, *vide PRACTICE, XI. 36. 37.*

### EXECUTION.

*Vide DEBTOR AND CREDITOR, I, 2. 8.*

13. JUDGMENT, 23. MORTGAGE, 7.

## EXECUTOR AND ADMINISTRATOR.

*Actions by and against, account, allowances, and costs in such actions.*

1. Where a plaintiff claimed as legatee and as a creditor, and proved only his right as legatee; and the defendants, who were executors, had caused great expense and delay, by raising unfounded objections, neither party were allowed costs. *Brown v. Rickets*, 303
2. Executors and administrators, or trustees, acting with good faith, and without any wilful default or fraud, will not be responsible for losses that may arise. *Thompson v. Brown*, 419
3. Where an executor, or other trustee, mismanages the estate confided to his care, or puts the assets in jeopardy, by his actual or impending insolvency, the court will restrain him from all further intermeddling with the estate, and compel him to restore the funds in his hands. *Elmendorf v. Lansing*, 562
4. An executor, on a bill filed against him by his co-executors, was restrained from all further interference in the management of the estate, and ordered to restore to the plaintiffs a bond and note of the estate in his possession, but not to account for the money he had received on the bond, or to pay the costs of the suit. *ib.*
5. Where an administrator of a deceased partner, without applying to the court for its direction, *bona fide*, permitted the surviving partner to sell the joint stock, in the usual course of the trade, for the joint benefit of himself and the intestate's estate, he was held not to be responsible to the creditors for any loss; though he might be personally liable for any debts contracted by such assumed partner. *Thompson v. Brown*, 619
6. But, if the administrator puts into the hands of the surviving partner, assets which he had in his own hands and under his own control, to trade with, he will be responsible for the loss. *ib.*
7. A creditor may come into this court against an executor or administrator, for a discovery of assets. *ib.*
8. Upon the usual decree to account, in a suit by one or more creditors against an executor or administrator, either separately for themselves, or specially, in behalf of themselves and all other creditors who will come in, &c. the decree is for the benefit of all the creditors, and in the nature of a judgment for all: and all the creditors are entitled, and should have notice for that purpose, to come in and prove their debts before the master; and they are to be paid, rateably, after judgment creditors are satisfied, without preference, or regard to the legal priority of specialty, over simple contract creditors. *ib.*
9. Such a suit and decree for the sale of the assets, draws to this court the entire distribution of them. *ib.*
10. A decree in this court, is equivalent to a judgment at law, and if prior in time, it is to be first paid. *ib.*
11. And from the date of the decree, and a due disclosure of assets,



an injunction will be granted, on the motion of either party, to stay all proceedings of the creditors at law. *ib.*

12. But creditors will not be restrained from proceeding at law, merely on a bill being filed against the executor or administrator in this court; and a judgment at law obtained before a decree in this court, will be protected in its priority. *ib.*
13. A widow and administratrix, who under her claim of dower, and as guardian to her infant children, had received the rents and profits of the real estate, and applied them to the necessary maintenance of the children, prior to due notice and application of creditors, was not held to account for the rents and profits so received and expended. *ib.*
14. The doctrine of equitable assets, by which all the creditors are paid *pari passu*, is not affected by the statute; *sess.* 36, *ch.* 93. (1 *N. R. L.* 36.) for the omission of the 4th section of the *English* statute, (3 *W. & M.* 114.) which excepts devises of lands to pay debts, does not vary its construction. *Benson v. Le Roy*, 681
15. And a devise of all the testator's estate, real and personal, in trust to pay debts and to distribute the residue, places the assets under the jurisdiction of this court. *ib.*

*Vide* SET OFF, 3. TRUST AND TRUSTEE, 11, 15, 16. POWER, 1, 2. DEVISE. DEBTOR AND CREDITOR.

## EXECUTORY DEVISE.

*Vide* DEVISE, 3. 5. 7.

## F.

### FEME COVERT.

*Vide* BARON AND FEME.

### FOREIGN ATTACHMENT.

*Vide* FOREIGN LAWS. BANKRUPT.

### FOREIGN CORPORATIONS.

*Vide* CORPORATIONS.

### FORECLOSURE.

*Vide* MORTGAGE, III.

### FORFEITURE OR PENALTY.

*Vide* JURISDICTION, 7, 8. 12.

### FOREIGN LAWS.

1. A debt due by C. an *American* citizen, to M. a *British* subject resident in *London*, was recovered by foreign attachment, and a judgment thereon, in the Mayor's Court of the city of *London*, in due course of law, out of monies which had come to the hands of the agents of C. in L: *Held*, that the payment of the debt by the agents of C. being compulsory and by the judgment of a court of competent jurisdiction, was a bar to a suit brought here to recover the same debt, either by M., or by trustees of the creditors of M., under a process of attachment which had been issued here, at the instance of an *American* creditor of M., pursuant to the act giving relief against absent debtors, &c. previous to the

process of foreign attachment  
in *London*. *Holmes v. Remsen*,  
460

2. For the title of the foreign assignees, and of the American trustees, being equally valid under the laws of their respective countries, the debt is well paid to the party who has used the greatest legal diligence to recover it. *ib.*
3. The succession to, and distribution of, personal property, is regulated by the *lex domicilii*; not by the *lex loci rei sitæ*. *ib.*
4. A voluntary assignment, made *bona fide*, by a debtor, of all his property, for the benefit of all his creditors, is valid, and will pass *debts* due to him in foreign countries. *ib.*
5. So will an assignment under a bankrupt law of his country, either because it is equivalent to a voluntary assignment by the debtor; or because the *domicil* of the owner draws to it his personal property; or because, it is an established rule of *comity* among nations. *ib.*
6. Foreign laws may be proved by witnesses as matters of fact. *Brush v. Wilkins*, 520

#### Vide BANKRUPT.

#### FRAUD.

1. Where the attorney of the plaintiff attended the sale of a farm of the defendant, under an execution; and the farm, which was worth two thousand dollars, was sold to the attorney for ten dollars, the gross inadequacy of the price, connected with the fact, that the sale was on a stormy day, when no person but the attorney and deputy sheriff were present, was held sufficient to warrant the inference of *fraud*. *Howell v. Baker*, 118
2. Where a judgment and execution, which had been fully paid and satisfied, were kept on foot by the assignees of the judgment, fraudulently, for the purpose of speculating on the property of the debtor, and which the defendants, assignees of the judgment, purchased at the sheriff's sale, they were decreed to execute a *release* of all the title and interest so acquired, to the owner of the lands, so fraudulently sold on execution, and to deliver up the possession thereof, pay the rents and profits, and damages for any *waste* committed, with all costs, &c. *Troup v. Wood and Sherwood*, 228
3. An agreement by the owner of an execution, on which lands to an amount in value far exceeding the debt had been seized, to prevent the usual competition at the sheriff's sale, and in order to leave a balance due on the execution, for the purpose of having lands of the debtor in other counties seized and sold, is fraudulent: and the execution is deemed in law to be satisfied. *ib.*
4. *J. S.* sold and conveyed a lot of land to *H.* and took a mortgage to secure part of the purchase money. The mortgage was duly recorded, in the county of *Onondaga*, where the land was situated; but *H.* neglected to have his deed recorded, pursuant to the statute. The defendants having purchased the claim of a person in possession without title, pro-

cured a *release* and quit claim from *J. S.* for the consideration of ten dollars, though the lot was worth six thousand dollars, and had it recorded before the deed of *H. Held*, that the subsequent release and quit claim by *J. S.* was fraudulent, the record of the mortgage being sufficient evidence that *J. S.* had then no title : and the defendants were decreed to release all claim to *H.*, so as to *quiet* his title. *Lupton v. Cornell*, 262

luntary settlement, were decreed to hold the stock, subject to the order and disposition of the trustees of the creditors under the general assignment. *ib.*

4. *It seems*, that there is no difference in the construction of the 11th and 15th sections of the statute of frauds, (*sess.* 10. c. 44. 1 *N. R. L.* 75.) or the 4th and 17th sections of 29 *Car.* 2. c. 3. as to what is a sufficient signing of a contract by the party to be charged. *McComb v. Wright*, 659

5. An auctioneer is an agent lawfully authorized by the purchaser of lands or goods, at auction, to sign the contract of a sale for him, as the highest bidder. *ib.*

6. Writing the purchaser's name, as the highest bidder, on the memorandum of sale, by the auctioneer, immediately on receiving the bid, and knocking down the hammer, is a sufficient signing of the contract, within the statute of frauds, so as to bind the purchaser. *ib.*

### FRAUDULENT CONVEYANCES.

1. A voluntary settlement, either of lands or chattels, by a person indebted at the time, is void as against creditors. *Bayard v. Hoffman*, 450

2. Whether the statute of frauds (1 *N. R. L.* 75. *sess.* 10. c. 44. 13th *Eliz.* c. 5.) applies to a settlement of that kind of property which could not be reached by legal process, if no settlement had been made, such as choses in action, money in the funds, &c. ? *Quære.* *ib.*

3. An assignment by a debtor of "all his estate, real and personal, and of all books, vouchers and securities relative thereto," in trust, for the benefit of all his creditors, passes all his estate and interest, equitable and legal, and his rights of action, or as *cestui que trust* ; and, therefore, includes stock of the *United States* before voluntarily assigned by the debtor, when insolvent, in trust, for the benefit of his wife and children ; and the trustees under the vo-

### FREIGHT AND CHARTER PARTY.

1. When a ship puts into an intermediate port, in distress, and is condemned as unseaworthy ; and it becomes necessary, for the transportation of the cargo saved, to its destined port, to hire another ship, the cargo, on its arrival at the port of destination, is chargeable with the increase of freight arising from the charter of the new ship : That is, the extra freight beyond what the freight would

have been under the original charter party, if the necessity of hiring another ship had not intervened. *Searle v. Scovell*, 218

2. The owner of the goods is not answerable both for the old and new freight. *ib.*
3. To ascertain such *extra* freight, the proper rule seems to be, to determine the difference between the amount of the freight under the original charter party, and the *rateable freight*, for the goods saved, to the port of necessity, added to the freight of the new ship hired to carry on the goods. *ib.*
4. The *extra* freight for the renewed voyage, in such case, is a *lien* on the cargo. *ib.*

*Vide* PARTNERSHIP, 4, 5.

#### FUGITIVES FROM JUSTICE.

1. It is the law of nations to deliver up offenders charged with felonies and other high crimes, and who have fled from the country where such crimes were committed, into a foreign and friendly jurisdiction. *Matter of Washburn*, 106
2. It is the duty of the civil magistrate to commit such fugitives from justice, to the end, that a reasonable time may be afforded for the government here to deliver them up, or for the foreign government to make application to the proper authorities here for their surrender. *ib.*
3. But if such application is not made in a reasonable time, the party ought to be discharged. *ib.*
4. The evidence to detain a fugitive from justice, for the purpose of his being surrender-

ed, ought to be such as would be sufficient to commit him for trial, if the offence was committed here. *ib.*

5. The 27th article of the treaty of 1796, between the *United States* and *Great Britain*, was merely declaratory of the law of nations on this subject; and since the expiration of that treaty, the general principles of the law of nations remain obligatory on the two nations. *ib.*
6. Therefore, the Chancellor, or a Judge, in vacation, has jurisdiction to examine a prisoner brought before him, on *habeas corpus*, and who had been taken in custody on a charge of *theft*, or felony, committed in *Canada*, or a foreign state, from which he had fled; and if sufficient evidence appears against him, to remand him; otherwise, to discharge him. *ib.*

#### G.

##### GUARDIAN.

*Vide* INFANT, 1. 7. PRACTICE, II. 9.  
TRUST AND TRUSTEE, II. 10. 14.

#### H.

##### HABEAS CORPUS.

*Vide* INFANT, 1, 2. FUGITIVES FROM JUSTICE, 6.

##### HEARING.

*Vide* PRACTICE, X.

##### HEIRS AND DEVISEES.

1. A creditor may file a bill in this court against heirs and devisees

for an account, and for a sale and distribution of the real estate descended or devised, in order to make good any deficiency of *personal* assets. *Thompson v. Brown*, 619

2. But the real estate will not be directed to be sold, until the amount of the debts and the deficiency of the personal estate have been duly ascertained. *ib.*
3. It is no objection to the sale of the real estate for the payment of debts, that the heirs are infants. *ib.*
4. And where there is a decree for the sale of the *assets* descended, it enures for the benefit of all the creditors, and draws the entire distribution of the assets into this court. *ib.*

*Vide DEVISE.*

## HUSBAND AND WIFE.

*Vide* **BARON AND FEME.**

### I.

## IDIOTS AND LUNATICS.

1. Where, on the petition of a relation of a lunatic, and who had received from him a deed of a farm, a few days before the finding of the inquisition of lunacy, an *issue* was awarded to try the fact of lunacy, and on the trial, the party was found to have been a lunatic for several years preceding, the party traversing the inquisition was ordered to pay costs. *Matter of Folger*, 169
2. The prosecutor of a charge of lunacy is not, of course, ordered to pay costs, where the party is found, by the inquisition, to

be of sound mind, if the prosecution has been in good faith, and upon probable grounds. *Brower v. Fisher*, 441

3. A person deaf and dumb from his nativity, is not, therefore, an idiot, or *non compos mentis*; though such, perhaps, may be the legal presumption, until his mental capacity is proved, on inquiry and examination for that purpose. *ib.*

*Vide* **MARRIAGE, 1, 2, 3.**

## INFANT.

1. Where an infant is brought up on *habeas corpus*, the court will inquire whether he is under any illegal restraint; and if he is, will set him at liberty; but if there is no improper restraint, the court will not, in this summary way, decide upon the right of guardianship, or deliver over the infant to the custody of another. *Matter of Wollstonecraft*, 80
2. If the infant is competent to form a judgment and declare his election, the court, after examination, will allow him to go where he pleases; otherwise the court will exercise its judgment for him. *ib.*
3. Maintenance will be allowed out of the capital of an infant's estate, where the principal is small, otherwise it must be out of the interest. *Matter of Bostwick*, 100
4. Application for maintenance may be by *petition*, without bill. *ib.*
5. A parent may be allowed to be reimbursed out of the infant's estate, for *past* maintenance. *ib.*
6. Where a deed was ordered to be cancelled as fraudulent and void, on a bill for that purpose,

filed against the representatives of the grantee, and a perpetual injunction granted against using the deed or record of it in evidence ; The decree was declared binding on such of the defendants, as were infants, unless within six months after coming of age, they should show cause to the contrary, on being served with process for that purpose. *Bushnel v. Harford*, 300

7. The act concerning infants, 9th April, 1814, (*sess.* 37. *ch.* 108.) and the act in addition thereto, March 24th, 1815, (*sess.* 38. *ch.* 106.) authorizing the sale of an infant's real estate, under the order and direction of the court, do not apply to the case of a female infant who is married. *Matter of Whitaker*, 378
8. It is not the usual practice of the court to appoint a guardian to an infant, who is a *feme covert* ; nor can the husband be guardian for his wife, in such case, as to the sale of her lands. *ib.*
9. These acts were intended for the better education and maintenance of infants, and for their special benefit ; not that the proceeds of the sale should be placed at the disposition of the husband of the infant. *ib.*
10. *It seems*, that a female ward of this court is not, of course, discharged from its protection, by marriage, or without an order of the court for that purpose. *ib.*

#### INJUNCTION.

- I. *In what cases granted, and against whom.*
- II. *To stay waste or trespass.*
- III. *To stay proceedings at law.*
- IV. *Injunction for other purposes.*

#### V. *When dissolved.*

#### VI. *When made perpetual.*

- I. *In what cases granted, and against whom.*
1. An injunction is never granted against persons who are not parties to the suit. *Fellows v. Fellows*, 25
2. Where new facts are stated in a supplemental bill, a fresh injunction may be awarded, though the former injunction was dissolved on the merits. *Fanning v. Dunham*, 35
3. An injunction will be granted, to restrain persons from navigating with *Steam Boats*, in violation of the exclusive privilege granted to *Livingston* and *Fulton*, on the waters lying between *Staten Island* and *Powles Hook* and the *Jersey Shore* ; the same being within the jurisdiction of this state. *Livingston v. Ogden and Gibbons*, 48
4. Where the defendants, a banking company, agreed with *B.* to hold the bills of the plaintiffs, a banking company, subject to his order, and *B.* engaged to accept the drafts of the defendants, at ten days sight, for the amount, no injunction lies to restrain the bills in their possession, or from demanding payment of them of the plaintiffs, for the agreement with *B.* merely suspended the right of the defendants to demand payment of the bills, until 10 days after the acceptance of their drafts by *B.* ; and the suspension ceased when *B.* made default, in accepting and paying the drafts. *Washington and Warren Bank v. Farmer's Bank*, 62
5. A creditor in *New Jersey*, where all the parties resided,

took from the maker of a promissory note indorsed by the plaintiff, a bond and mortgage, which was ample security for the debt ; and instead of resorting to the mortgage, or the debtor, sued the plaintiff, who was transiently in this state, at law : this court granted an injunction to stay the suit at law, until the creditor had pursued his remedy on the mortgage in *New-Jersey*. *Hays v. Ward*, 123

6. Where an injunction has been already granted, a second injunction will not be granted, while the other is in force, unless the first has been withdrawn by some agreement between the parties, and satisfactory reasons shown for a renewal of it. *Livingston v. Gibbons*, 571

7. Nor will an injunction be granted to restrain the defendant, who was charged by the plaintiff with navigating the waters of this state with a *Steam Boat*, in violation of the plaintiff's exclusive right, from removing his boat, pending an action at law, brought to recover the boat as forfeited under the act of the 1st April, 1811 ; unless there is a direct and positive charge of danger that the boat will be eloiigned, pending the suit at law. *ib.*

11. *Injunction to stay waste or trespass.*

8. An injunction to stay waste, will not be granted, where the right is doubtful, or where the defendant is in possession, claiming adversely, and the plaintiff has brought an action of eject-

ment to recover the possession, at law, which is undetermined. *Storm v. Mann*, 21

III. *Injunction to stay proceedings at law.*

9. An agreement on the part of a creditor to collect the money rateably, of the several parties to a note, on their giving a bond and judgment for the amount, was enforced, by enjoining all further proceeding on the judgment against the plaintiff, on his paying into court his rateable proportion, &c. *Briggs v. Law*, 22

IV. *Injunction for other purposes.*

10. Injunction granted to restrain commissioners from proceeding to sell lands, to pay the sums assessed, under the act to amend the act, entitled, an act to incorporate the *Ulster and Orange Branch Turnpike Company*, (sess. 40. ch. 213.) for making the road, so as to give the owners of the lands an opportunity to complete the road themselves, through their own lands, within the second section of the act, according to its true construction. *Couch v. P. and D. of the Ulster and Orange Branch Turnpike Company*, 26

*Fide V. VI.*

V. *When dissolved.*

11. When the answer of the defendants denies all the equity of the bill, the injunction will be dissolved of course. *Couch v. Ulster and Orange Turnpike Company*, 26

12. Where an injunction had been granted, to stay a sale under a power contained in a mortgage, a few days before the expiration of the *six months'* notice, it was dissolved, after answer, on terms: viz. giving six weeks further notice of the time and place of sale, and a reference, in the mean time, to a master to ascertain the balance due, &c. *Nichols v. Wilson*, 115
13. When an injunction is allowed by the Chancellor, the defendant, before he puts in an answer, may move to dissolve the injunction, on the ground of a want of equity in the bill. *Minturn v. Seymour*, 173
14. Where the defendant, in answer to an injunction bill, admits the equity of the bill, but sets up new matter of defence on which he relies, the injunction will be continued to the hearing. *Minturn v. Seymour*, 497

#### VI. When made perpetual.

15. Where the plaintiff and those under whom he claims, have been in the quiet and uninterrupted possession of land, for above *twenty-five years*: an injunction restraining the defendants, (the Corporation of the City of New-York) from entering and digging down the ground so possessed by the plaintiff, was granted and made perpetual, or until the defendants shall have established, by due course of law, their right to the ground in question. *Varick v. The Corporation of the City of New-York*, 53
16. Where on a sale of land, mills, &c. in the possession of the defendants, under an execution

against them, the deed executed by the sheriff, *by mistake*, did not include the whole premises advertised and sold, the sheriff having taken the description from an original title deed for 72 acres, without averting to subsequent conveyances, of some small parcels, adjoining the original premises: the defendants and all parties supposing the sheriff's deed included the whole, and the purchaser having bid and paid a price accordingly: *Decreed*, that the defendants be perpetually enjoined from prosecuting the ejectment; suit at law, brought by them to recover the parcels of land not included in the sheriff's deed to the purchaser; and that they execute to the purchaser a release of all their right and title to the same. *De Riemer v. Cantillon*, 85

17. Where a deed was ordered to be cancelled, as fraudulent and void, the defendants and all persons claiming under it, were perpetually enjoined from using the record of it, as evidence of title. *Bushnel v. Harford*, 301

#### Vide STEAM BOATS. JURISDICTION. PRACTICE.

#### INSOLVENT DEBTOR.

1. An insolvent debtor may, *bona fide*, assign his property to trustees, before it has become bound by any *lien*, in trust, for the benefit of all his creditors; and the assent of the creditors is not necessary to give legal validity to the deed of assignment. *Nicoll v. Mumford*, 522
2. But where the assignment is directly to the creditors, without



the intervention of trustees, the assent of the creditors is requisite to give it legal validity. *ib.*

*Vide* DEBTOR AND CREDITOR, 3, 4, 5. 9. 10.

### INTEREST.

On a bond conditioned to pay with interest at six per cent, for the security of which a mortgage is taken, the obligee, after a forfeiture of the bond, is not entitled to seven per cent, the lawful interest; but interest is to be paid according to the contract, until it ceases to operate, by being merged in the decree. *Miller v. Burroughs*, 436

*Vide* TRUST AND TRUSTEE, III. 18, 19. 21.

### J.

#### JOINT OWNERS.

*Vide* SHIP-OWNERS, 1, 2, 3. PARTNERSHIP.

### JUDGMENT.

1. Where a judgment at law, by confession on a warrant of attorney, appears regular and formal, according to the record, this Court will not interfere with or impeach it, on the ground of any alleged irregularity, or informality, in entering it up; but will consider the rights acquired under such judgment as valid in law; especially, where several years have elapsed since the judgment, and the defendants have acquiesced in it, and in an execution and

sale under it. *De Riemer v. Cantillon*, 85

2. A judgment, after it has been fully paid and satisfied, cannot be kept on foot to cover any new demands of the plaintiff. *Troup v. Wood and Sherwood*, 228
3. Where the sheriff seizes sufficient property of the debtor, under an execution, the debtor is discharged from the judgment, and the plaintiff must look to the sheriff for his money. *ib.*

*Vide* JURISDICTION. FRAUD. SCIRE FACIAS.

### JURISDICTION.

1. Whether this court will take cognisance of a cause where the amount in controversy does not exceed the sum of fifty dollars? Or grant an injunction to stay execution on a judgment in a justice's court? *Quare. Moore v. Lytle*, 183
2. This Court possessing an exclusive jurisdiction over cases of lunacy and matrimonial causes, will sustain a suit instituted to pronounce the nullity of a marriage with a lunatic. *Wightman v. Wightman*, 343
3. So, where a marriage is unlawful and void, *ab initio*, being contrary to the law of nature, as between persons, ascendants or descendants, in the lineal line of consanguinity, or between brothers and sisters, in the collateral line, this Court, in a suit instituted for that purpose, will declare the marriage null and void. *ib.*
4. Whether the Court, there being no statute regulating marriages, or defining the prohibited degrees, which render them unlawful, will go further, and de-

- clare marriages between persons in other degrees of collateral consanguinity or affinity, void? *Quære.* *ib.*
5. This Court has no power to interfere with, or to set aside an assessment on the proprietors and occupants of lots, to defray the expense of a common sewer, made by Commissioners, under the direction of the Mayor, Aldermen and Commonalty of the city of *New-York*, pursuant to an act of the Legislature for that purpose, on the ground merely of a mistake in judgment of the Commissioners of estimate and assessment, in not including all the owners or occupants intended to be benefited by the sewer: there being no allegation of bad faith or partiality in the Commissioners, in making the assessment, which, after being ratified by the Common Council, is declared, by the act, to be final and conclusive. *Le Roy v. Corporation of the City of New-York*, 352
  6. The only remedy, if any, for the party aggrieved in such case, is at law. *ib.*
  7. This Court does not lend its aid to divest an estate, for the breach of a condition subsequent. *Livingston v. Tompkins*, 415
  8. It does not assist the recovery of a penalty or forfeitures or any thing in the nature of a forfeiture. *ib.*
  9. It will only interfere to protect the property from waste and destruction, or to prevent its removal out of the jurisdiction of the court, pending an action at law to recover the possession. *ib.*
  10. Where the plaintiff granted to the defendant the exclusive right of navigating with steam boats, for a certain time, between the city of *New-York* and the *Quarantine Ground on Staten Island, &c.* And it was provided in the grant or assignment, that if the state or legislature of *New-Jersey* should, at any time thereafter, obstruct or prevent the plaintiff from navigating with steam boats the waters of that state, that thenceforth the grant should cease and be void, &c. Held, that though the *casus federis* may have occurred, yet this Court would not interfere to restrain the defendant from continuing his right under the grant to him, until the plaintiff had established the fact *at law*, and his right to resume the grant. *ib.*
  11. Equity will not aid or enforce a mere voluntary agreement, not valid at law, especially against a legal claim for a just debt, and where there is no consideration, accident, or fraud. *Min-turn v. Seymour*, 497
  12. This Court does not, unless under very special circumstances, sustain a bill for a compensation in damages, for breach of an agreement. *Hutch v. Cobb*, 559
  13. Where there is neither accident nor mistake, misrepresentation nor fraud, this Court has no jurisdiction to afford relief to a party, on the ground that he has lost his remedy at law, through mere ignorance of a fact, the knowledge of which might have been obtained by due diligence and inquiry, or by a bill of discovery. *Penny v. Martin*, 566
- Vide* PARTNERSHIP.
14. The power of this Court to apply the remedy in the case, is

- co-extensive with its jurisdiction over the subject matter. *Kershaw v. Thompson*, 609
15. A suit by one creditor against an heir, and a decree for the sale of the assets descended, will enure for the benefit of all the creditors, and draw the entire distribution of the assets into this court. *Thompson v. Brown*, 619
  16. So, in the case of executors and administrators. *ib.*
  17. So, where a testator devised all his estate, real and personal, to trustees, three of whom were his executors, in trust, to pay his debts, and then to distribute the residue. It was held, that by the trust, the assets were placed under the jurisdiction of this court. *Benson v. Le Roy*, 651
  18. And this court will, therefore, enjoin a suit brought by a creditor, at law, for the purpose of gaining a preference over other creditors. *ib.*
  19. This court does not, of course, interfere to aid or enforce an execution at law. *Brinkerhoff v. Brown*, 671
  20. If a creditor seeks the aid of this court against the *real* estate of his debtor, he must first show a judgment at law creating a *lien* on such estate; and if he seeks aid in regard to the *personal* estate, he must show an execution, giving him a legal preference or lien on the goods and chattels, which he has pursued, to every available extent, at law, before he can resort to equity, for relief. *ib.*
  21. It is not sufficient that the plaintiff has become a judgment creditor, in the intermediate time between the bill and the answer. And, where the defendant has made all the discovery sought for in the bill, he may object to the relief, at the hearing, on the ground that the plaintiff does not show a judgment and execution at law. *ib.*
  22. A creditor, to entitle himself to the aid of this court, in the recovery of his debt, must show that he has prosecuted his debtor, at law, to judgment and execution, so as to have gained a legal lien and preference, at the time of filing his bill, or, at least, before issue joined in the cause. *Williams v. Brown*, 682
  - S. P. McDermutt v. Strong*, 687
  23. This court, as well as a court of law, allows a debtor to give a preference to one creditor over another. *Williams v. Brown*, 682
  24. And where a debtor in insolvent circumstances, confesses a judgment, for a debt justly due, the judgment creditor will retain his priority. *ib.*
  25. If, however, the debtor makes use of the judgment so confessed, to effect a sale or change of the property for his own purposes, and the property is sold at a great sacrifice, and purchased in by the debtor, this court will interfere, and either allow it to be redeemed, or put up again, at the price at which it was sold, and resold, for the benefit of the other creditors, as to any surplus beyond that price. *ib.*
  26. This court has power to assist a judgment creditor to discover and reach the property of a debtor, which is beyond the reach of an execution at law. *McDermutt v. Strong*, 687
  27. To get possession of the equitable interest of a debtor, as a re-

sulting trust, in goods or chattels, the creditor must come in to this court. *ib.*

28. But, before a judgment creditor can be entitled to the aid of this court, he must show an execution issued, levied and returned, and a failure of his remedy at law. *ib.*

29. A judgment creditor who so takes out execution at law, but is unable to reach a residuary trust interest in the chattels of his debtor, and files his bill for the aid of this court, gains, by his execution and legal diligence, a *legal preference to the assistance of this Court*, or a lien on the equitable interest, which cannot be affected or impaired by any subsequent assignment of that equity, by the debtor, either for the benefit of all his creditors, generally, as under the insolvent act, or for the benefit of a particular creditor. *ib.*

30. Though it is the favourite policy of this court, to distribute the *assets* of a debtor, among all his creditors, *pari passu*; yet when such a judicial preference has been established, by the superior legal diligence of any creditor, that preference will be observed in the distribution of the *assets*. *ib.*

*Vide* MARRIAGE, 2, 3, 4, 5. MORTGAGE, 23, 24. 27. FUGITIVES FROM JUSTICE. PRACTICE, III. 32. SURROGATE, 1.

## L.

### LACHES, LENGTH OF TIME, AND POSSESSION.

1. Where a farm had been occupied and cultivated for above

eighty years, during which time the original tenant and his descendants uniformly paid rent to the landlord, built houses, and made valuable and permanent improvements on the premises: *Held*, that a lease in fee, at the acknowledged rent, was to be presumed to have been originally given, or, at least, that there was an *agreement* for a lease, under which the tenant took possession, and upon the faith of, and in execution of which, he made his improvements. *Ham v. Schuyler*, 1

2. Equity, as well as a court of law may make such a presumption from length of time and possession. *ib.*

3. Where a person having the legal title to lands, but in trust for the defendants, sold and conveyed his right and title, for a valuable consideration, to a *bona fide* purchaser, without notice, who remained in possession of the land, for eighteen years before his death, and devised the same by his will: *Held*, that after the lapse of thirty years from the date of the deed, there being no evidence of its being fraudulent, the devisees of such purchaser were entitled to hold the lands discharged from the trust. *Coxe v. Smith and others*, 271

4. Lapse of time operates, in equity, only by way of evidence, as affording a presumption of payment. *Livingston v. Livingston*, 287

5. Therefore, where the defendant admitted the original covenant to pay rent, and did not, in his answer, pretend to any payment: *Held*, that he could not insist on the lapse of time, being twenty years from the date of the covenant to the filing of

the bill, as presumptive evidence of payment. *ib.*

6. Where there was a perpetual lease, reserving an annual rent, and no rent had been demanded for forty-four years from the date of the lease; on a bill for a discovery, by the lessor, on the ground of a loss of the counterpart of the lease: *Held*, that the lapse of time was sufficient evidence that the rent had been extinguished by some act or deed of the party entitled to it. *Livingston v. Livingston*, 294
7. Where the defendant, a *bona fide* purchaser, without notice, and those under whom he claimed, had been in possession of land above twenty-six years, before the plaintiffs filed their bill to enforce their claim, founded on an implied trust, the bill was dismissed, without costs. *Shaver v. Radley*, 310

#### LANDLORD AND TENANT.

*Vide* LACHES, LENGTH OF TIME AND POSSESSION, 1. 5, 6.

#### LAW OF NATIONS.

*Vide* FUGITIVES FROM JUSTICE.

#### LEGACY.

1. Though one legatee may sue alone for his specific legacy; yet where he claims, also, as a residuary legatee, all the residuary legatees must be made parties of the suit. *Davoue v. Fanning*, 199
2. Though the name of the legatee is entirely mistaken by the testator, as "*Cornelia Thompson*," for *Caroline Thomas*; yet the bequest is good; and the intention of the testator, and the

misnomer, being satisfactorily shown, the legacy was ordered to be paid to the person intended. *Thomas v. Stevens*, 607

#### LEX LOCI.

*Vide* FOREIGN LAWS.

#### LIEN.

*Vide* SHIP OWNERS, 2. JURISDICTION, 20. 22. 29.

#### LIS PENDENS.

*Vide* NOTICE, 1, 2.

#### LOST DEED.

*Vide* PLEADING, III. 12.

#### LUNATICS.

*Vide* IDIOTS AND LUNATICS.

#### M.

#### MARRIAGE.

1. Though a marriage with a lunatic is absolutely void, yet, as well for the sake of the good order of society, as the quiet and relief of the party, its nullity should be declared by the decision of some court of competent jurisdiction. *Wightman v. Wightman*, 343
2. And this court, possessing an exclusive jurisdiction over cases of lunacy and matrimonial causes, is the proper, and, indeed, since there are no ecclesiastical Courts having cognizance of such causes, the only tribunal to afford relief in such a case, and sustain a suit institu-

- is not fixed and certain ; but rests in the sound discretion of the court, to be regulated by circumstances. *Perine v. Dunn*, 140
13. The usual time, on a bill to redeem, is six months, from the liquidation of the debt by the master's report ; and, it seems, that when this time is allowed, it will not be, afterwards, enlarged. *ib.*
  14. On a bill for foreclosure, the time may be enlarged from six months to six months, or from three months to three months, upon equitable terms, and according to the circumstances of the case. *ib.*
  15. But this rule applies only to bills of foreclosure, strictly so called, where the equity of redemption is barred by the decree, and a complete title vested in the mortgagee ; and not to cases of a decree for the sale of the mortgaged premises according to the usual practice of the court. *ib.*
  16. Where a party fails to redeem within the time allowed, on a bill to redeem, it is usual to dismiss the bill, which amounts to a bar of the equity of redemption. *ib.*
  17. For where a bill is dismissed on the merits, without any direction that the dismissal shall be without prejudice, it may be pleaded in bar to a new bill for the same matter. *ib.*
  18. Where a bill was not simply to redeem, but to set aside a mortgage, three months only were allowed to the mortgagor. *ib.*
  19. Where a mortgagee has been detained from his remedy on the mortgage, for many years, by a long and tedious litigation, payment may be required in a much shorter time, as thirty days, after the final decision of the cause. *ib.*
  20. Parol evidence was admitted to show that a mortgage only, and not an absolute sale, was intended ; and that the defendant had fraudulently attempted to convert the loan into a sale ; and the plaintiff was, therefore, held entitled to redeem. *Strong v. Stewart*, 167
  21. If mortgaged premises are incapable of being sold in parcels, or of being divided, without injury, the whole may be sold, though the whole debt is not due ; and the proceeds applied to pay the interest and costs, and the surplus to the principal of the debt. *Campbell v. Maccomb*, 534
  22. Where, in such case, the bond having become forfeited at law, for the non payment of the interest, the whole mortgaged premises are decreed to be sold, and the mortgagor or purchaser of the equity of redemption, before the day of sale, pays the interest and costs, the sale will be stayed ; but the decree of sale and foreclosure entered, will remain as further security, to enforce the payment of future interest, and the instalments of the principal, as they respectively become due. *ib.*
  23. Though the mortgagee should be not only a trustee but a surety for the debt, and though the mortgaged premises are in a state of ruin and decay, and the security thereby impaired and rendered precarious, he is not, therefore, entitled to have the property sold, before the debt is due, or the debtor is in default. *ib.*

24. Nor will the Court, where the premises mortgaged, being a dam and bridge, were injured by storms, interfere to compel the mortgagor in possession, to repair them at his own expense. *ib.*
25. On the sale of premises under a mortgage, it was represented that the property was free from all incumbrances ; but after the sale and master's report, it was discovered, that the property was subject to a city assessment and tax ; and the purchaser, therefore, refused to complete the purchase, unless the incumbrances were removed. The court, the facts being satisfactorily proved, directed the master to discharge the incumbrances out of the proceeds of the sale. *Lawrence v. Cornell*, 542
26. The act passed April 12th, 1820, (*sess. 43. ch. 184.*) directing the sheriff or other officer, where lands are sold by virtue of any execution, to delay giving a deed to the purchaser, so as to give the debtor time to redeem within one year, on certain terms, does not apply to the case of a sale by a master, of mortgaged premises, under a decree of sale and foreclosure. *Ten Broeck v. Lansing*, 601
27. Where, after a foreclosure and sale of mortgaged premises, the mortgagor or defendant, or any person who has come into possession under him, pending the suit, refuses to deliver up the possession, on demand, to the purchaser under the decree, the court, on motion for that purpose, will order the possession to be delivered to the purchaser, and not drive him to his action of ejectment at law, though the delivery of possession is not made a part of the decree. *Kershaw v. Thompson and others*, 609
28. And in case of disobedience to such order, an injunction issues ; and on proof of its service, and refusal by the party to obey it, a writ of assistance issues, of course, to the sheriff. *ib.*
29. But where the delivery of possession is made part of the decree, a writ of execution is the proper remedy in case of disobedience. *ib.*
30. A mortgagor, where the equity of redemption has been sold by a sheriff under an execution at law, has, by the act of the 12th of April, 1820, (*sess. 43. ch. 184.*) one year from the sale to redeem the land from the purchase ; and, therefore, on a bill to foreclose, during the year, he ought to be made a party to the suit. *Hallock v. Smith*, 649

*Vide* INTEREST. CONTRIBUTION.

N.

NEW-YORK, CORPORATION OF.

*Vide* INJUNCTION, V. 15.

NON COMPOS MENTIS.

*Vide* IDIOTS AND LUNATICS.

NORTH RIVER STEAM BOAT COMPANY.

*Vide* STEAM BOATS.

NOTICE.

1. Though, in a bill filed against a

trustee of lands, for an account, and a conveyance of them to the *cestui que trust*, the description of the lands is general, as "divers lands in *Cosby's Manor*, in the patent of *Springfield*," it is enough to put a purchaser of a lot in *Cosby's Manor*, on inquiry; and being chargeable with notice of the pendency of the suit, and of all the facts in the bill, it is good notice to him that the lot purchased was a part of the trust estate mentioned in the bill. *Green v. Slayter*, 38

2. A *lis pendens*, or constructive notice of a suit pending against a trustee for an account, &c. will not prevent the payment by the debtor of a bond to the trustee, or to his assignee, being the legal owner of the bond, no receiver having been appointed by the court. *ib.*

*Vide* TRUST AND TRUSTEE. MORTGAGE.

## P.

### PARTITION.

1. When on a bill for partition, the legal title is disputed and doubtful, the course is, to send the plaintiff to a court of law, to have his title first established. *Coxe v. Smith*, 271
2. But where the question arises upon an equitable title set up by the defendants, this court must decide on the title. *ib.*

### PARTNERSHIP.

1. The interest of each partner in the partnership property, is his share in the surplus, subject to

partnership accounts, &c. *Nicoll v. Mumford*, 522

2. And that interest alone is liable to the separate creditors of each partner, claiming either by assignment or execution. *ib.*
3. An assignee, therefore, or separate creditor of one partner, is entitled only to the share of such partner, after a settlement of the accounts, and after all the just claims of the other partner are satisfied. *ib.*
4. Owners of the freight and cargo of a vessel are partners or joint tenants, and the assignee or separate creditor of one of them, takes his interest, subject to an account between him and his copartner in the voyage. *ib.*
5. But where one joint owner of the freight and cargo of a particular vessel, on a particular voyage, assigns his interest therein, one of them, who has got possession of the whole proceeds, cannot retain the share so assigned, to satisfy claims which he may have against the other, arising from former and distinct voyages or adventures, in which they have been concerned together in the same or other vessels; they not being general partners in trade, and there not being any connection between the different voyages or adventures. *ib.*
6. The Court may appoint a person to carry on trade for an infant partner. *Thompson v. Brown*, 619
7. Where the plaintiffs brought an action at law against two persons, as partners in trade, under the firm of *R. & M.*, and recovered judgment, but for which they were unable to obtain satisfaction out of their joint pro-



- party, or the separate property of *M.*, the other partner not having been brought into court, on the *mens* process; and the plaintiffs, afterwards, discovered, for the first time, that *N.*, *L.*, and *P.*, three other persons, were *dormant* partners with *R.* and *M.*, and jointly interested in the transaction out of which the plaintiff's right of action arose: *Held*, that this Court had no jurisdiction to afford relief against the *dormant* partners. *Penny v. Martin*, 566
3. The association of the stockholders of the "*North River Steam Boat Company*," is not a *copartnership*; but the parties are tenants in common of the property and franchises belonging to the company. *Livingston v. Lynch*, 573

*Vide* EXECUTORS AND ADMINISTRATORS, 5, 6.

## PARTY WALL.

*Vide* CONTRIBUTION.

## PENALTY.

*Vide* JURISDICTION.

## PLEADINGS.

- I. *Pleadings generally*.
- II. *Parties*.
- III. *Bill*.
- IV. *Demurrer*.
- V. *Plea*.
- VI. *Answer*.

### I. *Pleadings generally*.

- 1. Pleadings should consist of averments or allegations of facts, stated with as much brevity and precision as possible; not of in-

ference or argument. *Hood v. Hunan*, 437

- 2. *Impertinence* in pleadings consists in setting forth what is not necessary to be set forth; as stuffing them with recitals and long digressions as to matters wholly immaterial. *ib.*
- 3. Generally, the bill and answer ought not to set forth *deeds in hæc verba*; but so much of them only, as is material to the point in question: nor ought they to be argumentative or rhetorical. *ib.*

## II. *Parties*.

- 4. If the plaintiff, who sues as administrator, has not actually taken out letters of administration, or if the letters of administration have not been granted by the proper officer, it may be objected to by plea, or in the answer, or by demurrer; and if insisted on at the hearing, the bill will be dismissed. *Goodrich v. Pendleton*, 549
- 5. But if letters of administration are duly taken out at any time before the hearing, it will be sufficient, and may be charged by way of supplement or amendment to the bill. *ib.*
- 6. On a bill to foreclose a mortgage, all incumbrancers existing at the commencement of the suit, must be made parties. *Ensforth v. Lambert*, 605
- 7. Where the objection of a want of parties is made out of season, the plaintiff, instead of amending the original bill, may file a *supplemental* bill, merely to bring in the parties wanted; and the defendants in the original bill need not, in such case, be made parties to the *supplemental* bill. *ib.*

3. On a bill to foreclose a mortgage, the mortgagor whose equity of redemption has been sold by the sheriff under an execution at law, must be made a party; as he has, by the act of the 12th of April, 1830, (sess. 43. ch. 184.) one year from the sale to redeem the land from the purchase, and, therefore, an existing right of which he cannot be divested within the year. *Holbeck v. Smith*, 649
  9. Where a bill was filed against C., charging him with fraud and breach of trust, as administrator of B., and the defendant, in his plea, alleged that all the acts done in relation to the estate of B., were done by him and F. jointly, as administrators, to which there was no replication: *Held*, that on the allegation in the plea, F., the co-administrator, ought to be made a party. *Dugan v. Claw*, 116
  10. Though one legatee may sue alone for his specific legacy, yet where he claims, also, as a residuary legatee, all the residuary legatees must be made parties to the suit. *Davous v. Fanning*, 199
  11. A foreign corporation, or incorporated bank of another state, may sue in their corporate name and file a bill for the sale of land in this state, under a mortgage to secure money lent. *Silver Lake Bank v. North*, 370
- ### III. Bill.
12. If relief, as well as discovery, be prayed for, on the ground of a lost deed, there must be an affidavit of the loss. *Livingston v. Livingston*, 294
  13. If a bill for discovery and relief be good as to the discovery, a general demurrer to the whole bill is bad. *ib.*
  14. A bill for discovery, in aid of a cause before the Surrogate, brought for an account and distribution of the intestate's estate, must charge certain facts within the knowledge of the defendant, the disclosure of which is material and necessary to the party's defence in that Court, and that he has no means of showing the facts, without such discovery. *Seymour v. Seymour*, 409
  15. But, it seems, that where the bill is for discovery merely, and no injunction is asked for, and there is a demurrer to the bill, the Court will not examine so nicely as to the materiality of the discovery. *ib.*
- ### IV. Demurrer.
16. Where it appears on the face of the bill, that there has been a decree in a former suit between the same parties, the defendant may demur. *Davous v. Fanning*, 199
  17. If a bill blends together a demand by the plaintiff, as legatee, against the defendant, as executor, with a demand of the plaintiff, in his private capacity, against the defendant, in his individual character, it is good cause of demurrer; and the bill will be dismissed with costs. *ib.*
  18. If a bill for discovery and relief be good as to the discovery, a general demurrer to the whole bill is bad. *Livingston v. Livingston*, 294
- ### V. Plea.
19. A plea must be perfect in itself, so, as if true in fact, it will put

- an end to the cause. *Allen v. Randolph*, 693
20. If circumstances of fraud are charged in the bill, they must be denied by a general averment, at least. *ib.*
21. Where the bill charged misrepresentation, coercion, and fraud, in procuring a release of a debt, and the defendant put in a plea and answer, and in his plea, insisted on the release, in bar, without noticing the allegation of fraud, though in the answer it was fully met and denied, the plea was held bad. *ib.*
22. Where a bill is dismissed on the merits, without any direction that the dismissal shall be without prejudice, it may be pleaded in bar to a new bill for the same matter. *Perine v. Dunn*, 140
23. The issue, as to the truth of the plea, is to be referred to the state of facts at the time the plea is filed. *Cook & Kane v. Mancus*, 166
24. Where the defendants pleaded certain outstanding judgments, and the Court gave leave to the plaintiffs to amend their bill, by making the judgment creditors parties; and subsequent to the order for amendment, the judgments were satisfied and discharged; and the plaintiffs, instead of amending their bill, replied, taking issue on the plea; the court ordered the plaintiffs to pay the costs of the plea and the subsequent proceedings, in thirty days, or that the bill stand dismissed with costs: but if the costs were paid, then the defendants to answer the bill in six weeks, or that it be taken *pro confesso*. *ib.*
25. Though a decree in a former suit, to which the plaintiff and defendant were parties, cannot be pleaded in bar, until it is signed and enrolled, it may be insisted on by way of answer. *Davous v. Fanning*, 199
26. Where a cause was brought to a hearing on the bill and answer, and the bill was dismissed with costs, because no person appeared for the plaintiff, and the decree was enrolled, it was held to be no bar to another suit for the same matter. *Ross v. Rust*, 306
- VI. Answer.
27. A decree in a former suit between the same parties, not signed and enrolled, though it cannot be pleaded in bar, may be insisted on by way of answer. *Davous v. Fanning*, 199
28. Where a bill is taken *pro confesso*, against a defendant absent from the state, he may come in, after the decree, and answer and defend the suit. *ib.*
29. A defendant who submits to answer, must answer fully. *Phillips v. Prevost*, 205
30. But the general rule is subject to exception and modification according to the circumstances of the case: as where the defendant objects to a discovery because the plaintiff has no title. *ib.*
31. So, where a bill was filed by the executors of a creditor, claiming under a judgment of more than *thirty-six* years standing, against the legal representatives of the debtor, above *thirty* years after his death, without accounting for the delay, or showing any attempt to recover the debt at law, and seeking a discovery and account of assets; the defendants, after admitting the death of the original parties to

- the judgment, and the representative character of the defendants, may object to any discovery as to *assets*, or as to the material objects of the bill, on the ground of the staleness of the demand, and the great lapse of time *ib.*
32. A defendant is not bound to answer so as to subject himself to a penalty or forfeiture. *Livingston v. Tompkins*, 432
33. After a plea has been overruled, the same defence may be insisted on, by way of answer. *Goodrich v. Pendleton*, 551

## POWER.

1. Where a power is given to executors to sell an estate, or certain parts of it, it is a personal trust and confidence, and they cannot sell by attorney. *Berger v. Duff*, 368
2. Thus, where *A.* authorized his executors, *B.* and *C.*, to sell certain lots of land, if, under the circumstances of the times, they should deem it prudent; and *C.* having gone abroad, sent a power of attorney to *B.*, his co-executor, to sell the land on such terms as he should deem expedient: *Held*, that an agreement for the sale, entered into by *B.*, for himself and *C.*, was not valid, and a bill filed for a specific performance of it was, accordingly, dismissed. *ib.*

Power of sale in a mortgage, *Vide*  
MORTGAGE.

## PRACTICE.

- I. *Filing Bill, and Process.*
- II. *Appearance.*

- III. *Removal of the cause into the Circuit Court of the United States.*
- IV. *Motions, Petitions and Orders.*
- V. *Amending and dismissing the bill.*
- VI. *Taking the bill pro confesso.*
- VII. *Putting the plaintiff to his election.*
- VIII. *Amending the answer, or filing a supplemental answer.*
- IX. *Taking testimony, feigned issue, and other intermediate proceedings.*
- X. *Hearing and Rehearing.*
- XI. *Reference to a Master, Report and Exceptions.*
- XII. *Decree.*
- XIII. *Execution of Decree.*
- XIV. *Solicitors and Agents.*

I. *Filing Bill, and Process.*

1. Where an attachment is issued to enforce appearance, or to answer, the body of the writ is general, but the *suit* and the cause of the attachment; are endorsed thereon, or appear in a label annexed, so that the party may, at once, comply, without application to the Court. *Matter of Vanderbilt*, 57
2. But where the attachment is issued for a contempt in disobeying an injunction, an endorsement or label, specifying the cause of action, is not necessary. *ib.*
3. On an attachment for a contempt, or for disobeying an injunction, the party is not to be bailed by the sheriff, but is to be brought before the Chancellor, to answer specific charges; and he will then be ordered to be bailed to appear, from day

to day, until the party complaining has prepared his interrogatories, on which he is to be examined before a master.

4. A *cross* bill must be filed before publication passed in the original cause. *Gouverneur v. Elmendorf*, 357

## II. Appearance.

5. The usual mode of appearing in this court, is by entering an appearance with one of the clerks of the court. *Livingston v. Gibbons*, 94
6. But, it seems, that a notice by the defendant's solicitor, of an appearance, given to the plaintiff's solicitor, without an entry of the appearance on the clerk's minutes, would be binding on the party. *ib.*
7. An appearance filed with the register, is an appearance on the records of the court.
8. Where a defendant puts in an answer, which is read in court, by the consent of the plaintiff's counsel, and ordered to be filed with the register, it is an appearance on the records of the Court. *ib.*
9. A female defendant, unmarried, above sixty years of age, and who had been deaf and dumb from her infancy, was admitted to appear and defend by guardian. *Markle v. Markle*, 168
10. Where the plaintiff's solicitor, at the request of the defendant's solicitor, sent him a copy of the bill, and requested that an answer might be put in, it was held to be an admission of an appearance, or waiver of a formal entry of appearance; and that the defendant was, therefore, to be considered as

in Court, and entitled to be served with a rule to put in an answer, before the bill could be taken *pro confesso*. *Livingston v. Woolsey*, 365

## III. Removal of Cause into the Circuit Court of the United States.

11. If a defendant intends to remove a cause into the Circuit Court of the United States, he must file his petition, &c. for that purpose, at the time of entering his appearance in this Court. *Livingston v. Gibbons*, 94
12. Where a defendant files his answer to an injunction bill, and is heard by his counsel, on the merits of the bill and answer, and the Court makes a decretal order in the cause, it is too late to make application for the removal of the cause. *ib.*
13. Where one of two defendants is a citizen of another state, and there is no joint trust, interest, duty or concern, in the subject matter of the controversy, he may be allowed to appear and defend alone, so as to enable him to remove the cause. *ib.*

## IV. Motions, Petitions and Orders.

14. Though an order dissolving an injunction, &c. may be discharged by motion or petition, on proper grounds, yet the most regular course is to discuss the merits of the order on the rehearing. *Fanning v. Dunham*, 35
15. Application for an allowance out of the capital of an infant's estate, for his maintenance, may be by petition, without bill. *Matter of Bostwick*, 100

which the defendant cannot except to the report. . *ib.*

37. If the decretal order of reference is silent as to the mode of calculating interest, and the master does not allow *annual rests*, the plaintiff should apply, on the coming in of the report, for an order on the master to report his reasons for rejecting the claim, or make the rejection a ground of *exception* to the report. If he does neither, and the report is confirmed, he cannot, on a final hearing on the equity reserved, make the objection to the report. *Smith v. Smith*, 445

#### *Vide* TRUST AND TRUSTEE.

#### XII. Decree.

38. A decree cannot be impeached by an original bill, except on the ground of fraud. *Davoue v. Fanning*, 199
39. Though a decree in a former suit, to which the plaintiff and defendant were parties, cannot be pleaded in bar, until it is signed and enrolled, it may be insisted on by way of answer. And, when the decree in the former suit appears on the face of the bill, the defendant may demur. *ib.*
40. Where a bill is taken *pro confesso*, against a defendant, who is absent from the state, he may, under the statute, come in, after the decree, and answer and defend the suit. But he cannot institute a new suit, while the decree in the former suit remains in force. *ib.*
41. Where a cause was set down for hearing, on the bill and answer, and the bill was dismissed

with costs, because no person appeared for the plaintiff, and the decree was enrolled, it was held to be no bar to another suit for the same matter. *Rosse v. Rust*, 300

42. Where one of the defendants dies after the argument of a cause, and before judgment, the decree may be entered, so as to have relation back to the day of the final hearing. *Campbell v. Messier*, 334
43. A decree, after it has been entered, but before it is enrolled, may be corrected, where the omission or mistake was inadvertent, and is clearly ascertained. *Lawrence v. Cornell*, 545
44. A decree is never pronounced, unless the cause is regularly set down for hearing in term, except when it is submitted out of term, by consent of all parties; but the decree may be, afterwards, entered in term time, or in vacation, at the discretion of the Chancellor. *Rose v. Woodruff*, 547
45. Where a bill is taken *pro confesso*, the plaintiff cannot, therefore, take a decree; but must set down the cause for hearing in term; but no notice of the hearing need be given to the defendant, or affixed up in either of the public offices. *ib.*
46. A decree of this court is equivalent to a judgment at law; and in the case of executors and administrators, if it is prior to a judgment at law, it will be first paid. *Thompson v. Brown*, 619

#### XIII. Execution of Decree.

47. If, after a foreclosure and sale

of mortgaged premises, the mortgagor, or defendant, or any person who has come into possession under him, pending the suit, refuses to deliver up the possession, on demand, to the purchaser under the decree, the court, on motion for that purpose, will order the possession to be delivered to the purchaser, and not drive him to an action of ejectment at law; though the delivery of possession is not made part of the decree. *Kershaw v. Thompson*, 609

48. In case of disobedience to such an order, an injunction issues, of course, on affidavit of service of the order, &c. And on proof of the service of the injunction, and a refusal by the party to comply with it, a writ of assistance issues, of course, to the sheriff. *ib.*
49. But where the delivery of possession is made part of the decree, a writ of execution is the proper remedy, in case of disobedience. *ib.*

*Vide* JUDGMENT. INFANT.

As to PARTIES, *vide* PLEADINGS, I.

As to PLEADINGS, *vide* PLEADINGS.

#### XIV. Solicitors and Agents.

50. Where a solicitor files a bill in *propria persona*, as plaintiff, a notice served on his agent, as solicitor of the court, is good service. *Champlin v. Fonda & Lansing*, 62

*Vide* SOLICITOR AND ATTORNEY.

#### PRESUMPTION.

*Vide* LACHES, LENGTH OF TIME AND POSSESSION, 1, 2, 3, 4, 5, 6.

#### PRO CONFESSO.

*Vide* PRACTICE, VI.

#### PROCESS.

*Vide* PRACTICE, I.

#### PROBATE.

*Vide* SURROGATE.

#### REFERENCE.

To a Master, *vide* PRACTICE, XI.

#### REHEARING.

*Vide* PRACTICE, X.

#### R.

#### RELEASE.

Release by an Assignee, *vide* ASSIGNMENT.

#### REMOVAL OF CAUSES.

Into the Circuit Court of the United States, *vide* PRACTICE, III.

#### RENT.

1. Rent may be recovered in equity, where the remedy has become difficult or doubtful at law, or where there is a perplexity or uncertainty as to the title, or the extent of the tenant's responsibility. *Livingston v. Livingston*, 287

2. Where no rent had been demanded for *forty-four* years from the date of the lease, on a bill of discovery filed by the lessor, on the ground of a loss of the counterpart of the lease, it was held, that the lapse of time was sufficient evidence that the rent had been extinguished by some act or deed of the party entitled to it. *Livingston v. Livingston*; 294

Rents and Profits, *Vide* DEVISE.

### REVOCATION.

Of a will, *Vide* WILL.

S.

### SALE.

By a Master, *Vide* MORTGAGE, III.

At Auction, *Vide* FRAUDULENT CONVEYANCES. VENDOR and PURCHASER.

### SCIRE FACIAS.

Writs of *scire facias*, directed to a person convicted of felony, and sentenced to imprisonment in the State Prison for life, to revive a judgment against him, and *nihil* returned thereon, can have no legal operation or effect whatever; for such convict, being regarded as *civiliter mortuus*, the *scire facias* must be directed to his legal representatives or terre-tenants. *Troup v. Wood and Sherwood*, 228

### SEPARATION.

From bed and board. *Vide* BARON AND FEME.

### SET-OFF.

1. Joint and separate debts cannot

be set-off against each other in equity, any more than at law. *Dale v. Cooke*, 11

2. To authorise a set-off, the debts must be mutual, and due to and from the same persons, in the same capacity. *ib.*
3. A debt arising on a contract made with an executor, cannot be set-off against a debt due from the testator. *ib.*
4. Uncertain damages cannot be set-off in equity any more than at law. *Livingston v. Livingston*, 287
5. Therefore, on a bill of discovery, and for an account and payment of arrears of rent, the defendant is not entitled to be allowed, by way of set-off, damages for the breach of a covenant, on the part of the grantor, to allow him sufficient *common of pasture and estovers*. *ib.*

### SETTLEMENT. (*Voluntary*.)

1. A voluntary settlement either of lands or chattels, by a person indebted at the time, is void as against creditors. *Bayard v. Hoffman*, 450
2. Whether the statute of frauds, applies to a settlement of that kind of property which could not be reached by legal process, if no settlement had been made, such as *choses in action*, money in the funds, stock, &c.? *Quere. ib.*

*Vide* FRAUDULENT CONVEYANCES.

### SHERIFF.

*Vide* EXECUTION.

### SHIP OWNERS.

1. Ship owners are tenants in com-



mon, not joint tenants or partners; and one of them, where the vessel has been sold, knowing that the share of the others had been lawfully assigned, has no right to possess himself of the whole proceeds, with a view to retain such share, to satisfy any claims he may have against the other. *Nicoll v. Mumford*, 522

2. The assignee of one part owner of a vessel, is entitled to his part, or the proceeds thereof, without being subject to any general balance of account between the owners. *ib.*
3. But owners of the freight and cargo are joint tenants or partners. *ib.*

*Vide* PARTNERSHIP.

#### SOLICITOR AND ATTORNEY.

Whether an attorney or solicitor of the plaintiff can purchase the property of the defendant, at sheriff's sale, under an execution, for his benefit? *Quere.* *Howell v. Baker*, 118

#### SPECIFIC PERFORMANCE.

*Vide* AWARD.

#### STATE JURISDICTION.

1. By the declaration of the statute, passed April 6th, 1808, (1 *N. R. L.* 238. *sess.* 31. *c.* 135.) as well as by immemorial usage, the whole of the *Hudson* river, southward of the boundary of the city of *New-York*, and the whole of the *Bay* between *Staten Island* and *Long* or *Nassau Island*, are within the jurisdiction of this state. *Livingston v. Ogden and Gibbons*, 48

2. Therefore, a legislative grant of the exclusive privilege of navigating with *Steam Boats*, "in all creeks, rivers, bays, and whatsoever, within the territory or jurisdiction of the state," comprehends all the waters lying between *Staten Island* and *Powles Hook*, and the *Jersey shore*, as being within the jurisdiction of the state, either as part of the *Hudson River* or the *Bay*. *ib.*
3. The waters between *Staten Island* and the *Whitcomb Landing* in the city of *New-York* are part of the bay of *New-York*. *Matter of Vanderbilt*, 57

#### STATUTES CONSTRUED, EXPLAINED, OR CITED.

|                                         |          |
|-----------------------------------------|----------|
| 1787, Feb. 20. Sess. 10. c. 44.         |          |
| (Frauds,)                               | 450. 659 |
| 1808, April 6. Sess. 31. c. 144.        |          |
| (Jurisdiction of the state,)            | 48       |
| 1813, April 6. Sess. 36. c. 71.         |          |
| (Bank notes, and Banking associations,) | 329      |
| —, — 6. Sess. 36. c. 79.                |          |
| (Court of Probates and Surrogates,)     | 409. 549 |
| —, — 12. Sess. 36. c. 100.              |          |
| (Partition,)                            | 276      |
| —, — 13. Sess. 36. c. 102.              |          |
| (Divorces,)                             | 187      |
| 1814, April 9. Sess. 37. c. 108.        |          |
| (Infants,)                              | 378      |
| 1815, March 24. Sess. 38. c. 106.       |          |
| (Infants,)                              | 378      |
| —, April 11. Sess. 38. c. 157.          |          |
| (Surrogates,)                           | 549      |
| —, — 17. Sess. 38. c. 221.              |          |
| (Divorces,)                             | 187      |
| 1817, April 11. Sess. 40. c. 213.       |          |
| (Ulster and Orange Turnpike,)           | 26       |
| 1818, April 21. Sess. 41. c. 277.       |          |
| (Habeas Corpeas,)                       | 106      |

|                                   |          |
|-----------------------------------|----------|
| 1820, April 12. Sess. 43. c. 184. |          |
| (Executions,)                     | 601, 649 |
| Various acts concerning Steam     |          |
| Boats,                            | 150. 572 |

*Et vide* STEAM BOATS.

### STEAM BOATS.

1. The several acts of the legislature of this state, granting and securing to *R. R. Livingston*, and *Robert Fulton*, and their assigns, the sole and exclusive right of using and navigating boats or vessels, by steam or fire, in the waters of this state, for a certain number of years, are constitutional and valid acts. *Ogden v. Gibbons*, 150
2. And this Court will grant an injunction to restrain the citizens of another state from navigating the waters of this state by vessels propelled by steam, without the consent of the said *R. R. L.* and *R. F.* or their assigns, although such vessels may have been enrolled and licensed under the laws of the *United States*, as coasting vessels. *ib.*
3. The running or employing *Steam Boats*, over the waters of this state, for the transportation of passengers between the city of *New-York* and *Elizabethtown* point in *New-Jersey*, directly, or circuitously, by one or more *Steam Boats*, and shifting the passengers from one boat to another, at any intermediate point between those two places, without the consent of the person to whom *Livingston* and *Fulton* had assigned the exclusive right of navigating *Steam Boats* between those two places, is a violation of the right of such assignee : and an injunction was granted to restrain the defendant from so using or navigating *Steam Boats*, to the injury of the plaintiff. *Ogden v. Gibbons*, 174
4. Where the plaintiff, having an exclusive right to navigate with *Steam Boats*, the waters of the Bay of *New-York*, and that part of the *Hudson* river, south of the state prison, granted to the defendant the exclusive right of navigating with *Steam Boats* between the city of *New-York*, and the *Quarantine Ground* on *Staten Island*, &c. and it was provided in the grant or assignment, that if the state or legislature of *New Jersey* should, at any time thereafter, obstruct or prevent the plaintiff from navigating with *Steam Boats*, the waters of that state, that thenceforth the grant should cease and be void : Held that though the *casus fœderis* may have occurred, yet this Court would not interfere to restrain the defendant from continuing to exercise his right under the grant to him, until the plaintiff had established the fact *at law*; and his right to resume the grant. *Livingston v. Tompkins*, 415
5. The association of stockholders of the *North River Steam Boat Company* is not a copartnership, but the parties are tenants in common of the property and franchises of the company. *Livingston v. Lynch*, 573
6. The resolutions passed by the unanimous votes of the stockholders, on the 13th and 14th April, 1817, and subscribed by all of them, are the fundamental articles or constitution of the company, by which the former articles of agreement of the 26th July, 1814, were abrogated ; and the company being

only a private association of individuals, these articles cannot be altered or revoked, but by the like unanimous consent of all the stockholders. *ib.*

7. Therefore, certain resolutions passed the 5th May, 1819, not having been consented to by all the stockholders, and being repugnant to the *fundamental* articles of the association, are null and void. *ib.*

*Vide* INJUNCTION.

SUBSTITUTION.

*Vide* MORTGAGE, I. CONTRIBUTION.

SURETY.

1. A surety who pays the debt, is entitled to be put in the place of the creditor, and to all the means, and to every remedy which the creditor possesses, to enforce payment from the principal debtor. *Hayes v. Ward*, 123
2. If, therefore, a creditor takes a mortgage from the principal debtor, he does it not only for his own security, but for the indemnity of his surety; and he must do no act by which it may be invalidated, in the first instance, or be subsequently defeated or destroyed. *ib.*
3. Whether the surety can compel the creditor to resort first to the principal debtor, and exhaust his remedies against him, before resorting to the surety? *Quere.* *ib.*
4. Where the surety apprehends danger from the delay of the creditor, he may compel the creditor to sue the principal debtor; at least, on indemnifying the creditor for the conse-

quences of risk, delay, or expense. *ib.*

5. A creditor in *New-Jersey*, where all the parties resided, took from the maker of a promissory note, indorsed by the plaintiff, a bond and mortgage, which was ample security for the debt; and, instead of resorting to the mortgage or the principal debtor, sued the plaintiff (who was transiently in this state) at law: This court granted an injunction to stay the suit at law, until the creditor had pursued his remedy on the mortgage in *New-Jersey*. *ib.*
6. A creditor having a particular fund, may be compelled to resort to that fund, before he pursues the debtor personally. *ib.*
7. Where an indorser of a note discounted by the *Utica Insurance Company*, not being an incorporated banking association, took from the makers of the note a bond and judgment for his indemnity and security, and without any fraudulent intent to evade the *act restraining unincorporated banking associations*; (2 *N. R. L.*, 235. *sess.* 36. *ch.* 71.) the bond and judgment were deemed valid; and the Court refused to interfere, at the instance of a purchaser under a subsequent judgment, to prevent the indorser from obtaining payment of the judgment to him, he having been sued as indorser, and a judgment recovered against him. *Parker v. Rochester*, 329
8. A surety cannot sue the principal debtor for his indemnity or discharge, before the debt is due. *Campbell v. Macomb*, 538
9. As where a mortgagee, holding a mortgage, as a trustee for others, was, also, a guarantee

or surety for the debt, and the mortgaged premises were in a state of ruin and decay from storms, and the security thereby rendered precarious; yet, he cannot file a bill for the sale of the property, the debt not being due, nor the mortgagor in default. *ib.*

### SURROGATES.

1. A *surrogate* has concurrent jurisdiction with this Court, to compel administrators to account, and to make distribution of the estate. *Seymour v. Seymour*, 409
2. Where administrators have been brought before the surrogate who granted the letters of administration, for an account and distribution of the intestate's personal estate, this court will not, without some special and satisfactory reason, interfere with the proceedings of the surrogate, by granting an injunction, and sustaining a bill for general relief. *ib.*
3. A bill of *discovery*, in aid of the cause before the surrogate, must charge certain facts within the knowledge of the defendant, the disclosure of which is material and necessary to the party's defence in that court, and that he has no means of showing the facts without such discovery. *ib.*
4. The surrogate of the city and county of *New-York*, has no authority to grant letters of administration *with the will annexed*, of a person dying out of the state, not being an inhabitant of the state. *Goodrich v. Pendleton*, 549
5. His powers, though they may exceed those of the county surrogates, who have no power to

grant letters of administration of the goods of persons dying intestate out of the state, not being inhabitants of the state, are limited, in this respect, by the acts, sess. 36. ch. 79. §. 17. sess. 38. ch. 159. in the case of a non-resident of the state, dying intestate, and leaving goods and chattels in the city of *New-York*. *ib.*

### T.

### TENANTS IN COMMON.

Of a Ship. *Vide Ship Owners.*

### TREATY.

Between Great Britain and the United States, *vide FUGITIVES FROM JUSTICE.*

### TRUST AND TRUSTEES.

- I. *How trusts are created, and their incidents. Cestui que trust and trust estate.*
- II. *Authority and duties of a trustee.*
- III. *Trustee's accounts. Allowances to, and charges against.*
- I. *How trusts are created, and their incidents. Cestui que trust and trust estate.*
1. Though a trust be created for the benefit of a third person, as a creditor, without his knowledge, at the time, he may, afterwards, affirm the trust, and enforce its execution. *Shepherd v. McEvers*, 136
2. Where trustees have accepted the trust, and entered on its execution, they cannot, afterwards, without the consent of the *cestui que trust*, or the directions of the court, surrender the trust, or discharge themselves from it. *ib.*

3. The vested interest of a *cestui que trust*, cannot be impaired or destroyed by the voluntary act of the trustee; but the trust will follow the land in the hands of the person to whom it has been conveyed by the trustee, with knowledge of the trust, *ib.*

4. Where S., a *cestui que trust*, resided abroad, and before he was informed of a trust, created by a deed of his debtor, for the benefit of his creditors, the trustees, without the assent of the *cestui que trust*, or the direction of this court, conveyed the trust estate to others, upon other trusts and conditions, which, in their operation, would have excluded S. from all share or benefit in the trust estate; the trustees in the second deed were held chargeable with the trusts in the first deed, of which they had full knowledge at the time. *ib.*

5. If a trustee by implication, is to be affected by an equity, that equity must be pursued within a reasonable time. *Slaver v. Ridley*, 310

6. A devise of all the estate, real and personal, of the testator, in trust, to pay debts, and to distribute the residue, places the assets under the jurisdiction of this court. *Benson v. Le Roy*, 651

*Vide* LACHES, LAPSE OF TIME AND POSSESSION.

II. Authority and duty of a trustee.

7. Where the farm of a defendant, worth two thousand dollars, was sold under a judgment and execution on which there was not more than eighty dollars due, to the attorney of the plaintiff,

who attended the sheriff's sale, for ten dollars: Held, that under the circumstances, the purchase by the attorney was not to be considered as absolute, or as originally intended for his own benefit, but in trust for the respective interests of the parties to the execution; and the debtor, on a bill filed by him for that purpose, was allowed to redeem the estate, on paying the balance due on the execution, the amount paid by the attorney, with interest and costs. *Howel v. Baker*, 118

8. A person entrusted with business, as an attorney or agent for another, ought not to be allowed to make that business an object of interest or profit to himself. *ib.*

9. Whether an attorney or solicitor for the plaintiff can purchase the property of the defendant sold under execution, for his own benefit? *Quære. ib.*

10. If a guardian or other trustee, lends the money of the *cestui que trust*, without due security, he will be responsible, in case the borrower becomes insolvent. *Smith v. Smith*, 281

11. What is due security for moneys loaned by a trustee, appears to be a point not fully settled. *ib.*

12. It seems, that, in general, mere personal security is not sufficient to protect the trustee from responsibility, in case of loss. *ib.*

13. Where a guardian took promissory notes of persons, solvent at the time of taking the account before the master, under a decretal order of the court, on a bill filed for an account, and which notes were allowed by the master and credited to the guardian, who was ready to deliver them up; the

- court* confirmed the report of the master; the notes being for small sums, for rents, &c. and the credit and course of business according to the practice of the testator, in his life time. *ib.*
14. A guardian or trustee is not held to account for any neglect or breach of duty not charged in the bill. *ib.*
15. An executor or trustee is not allowed to use the trust money, and retain the profits arising from it. *Brown v. Rickets*, 303
16. If a trustee or executor mixes the trust money with his own, and uses it in his business or trade, the profits of which are not known, he must pay interest. *ib.*
- III. *Trustee's accounts. Allowances to, and charges against.*
17. Trustees acting with good faith, are treated with liberality and indulgence. And if there is no wilful misconduct or fraud on the part of a trustee or executor, he will not be held responsible for a loss, especially where he acts with the advice of counsel. *Thompson v. Brown*, 619
18. A trustee who mixes the trust money with his own, and uses it in his business or trade, the profits of which are not known, must pay interest. *Brown v. Rickets*, 303
19. But where there was no direction in the order of reference to the master, to inquire into the use and profit of the fund, and he had charged the party with interest, the report, to prevent the effect of surprise on the party, was re-committed to the master to take further proofs or explanations, and to correct any mistakes. *ib.*
20. Where the securities held by a trustee, are directed by a decree confirming a master's report, to be assigned to the *cestui que trust*, the responsibility of the trustee ceases; and there having been no culpable negligence or default on his part in taking the securities, he is not to be charged with them, on making the final decree, on the equity reserved, though they may have been, perhaps, impaired by the delay of the litigation between the parties. *Smith v. Smith*, 445
21. If a decretal order of reference is silent as to the mode of calculating interest, and the master does not allow *annual rents*, the plaintiff should apply, on the coming in of the master's report, for an order on the Master, to report his reasons for rejecting the claim, or make the rejection a ground of exception to the report. If he does neither, he cannot, on the final hearing on the equity reserved, make the objection to the report. *ib.*
22. In a suit by a *cestui que trust* against his trustees, for an account, &c. no costs were allowed to the plaintiff, the conduct of the defendants being fair and honest, and the allegations of misconduct unfounded. *ib.*

*Vide* VENDOR AND PURCHASER. EXECUTOR AND ADMINISTRATOR.

VENDOR AND PURCHASER.

1. Where a bill was filed against a trustee for an account, and that he should convey to the *cestui que trust*, the trust estate held by him, describing the same as "divers land in *Cosby's Manor*,

- in the patent of *Springfield*, and certain tracts or parcels of land in the *Oriskany Patent*," &c. And the trustee, previous to the filing of the bill, sold some of the land to *S.*, and took a mortgage for the purchase money, in his individual name, and assigned the bond and mortgage to *H.*; and *S.*, who purchased, without any knowledge of the trust, afterwards, and after the filing of the bill, paid the bond and mortgage to *H.*, without any actual notice of the pending of the suit against the trustee, or of the trust; *Held*, that *S.* was chargeable with notice of the pendency of the suit and of the facts stated in the bill; and that the description of the lands, though general, was sufficient to put him on inquiry; and, therefore, good notice to him that the lots which he purchased were part of the trust estate. *Green v. Slayter and others*, 39
2. But as the trustee, no receiver having been appointed, had a legal authority to receive payment of the mortgage, the payment by *S.* to him, and to *H.* his assignee, was good; for nothing but notice in fact, in such a case, can prevent a payment by the debtor, to the legal owner of the bond. *ib.*
  3. Where one person bids for another, at auction, but does not, at the time the lot is knocked down to him, nor on the day of sale, disclose to the vendor, nor to the auctioneer, the name of his principal, he is responsible as the purchaser. *McComb v. Wright*, 659
  4. If there is any doubt or difficulty as to the title, it will be referred to a master, to examine and report thereon. *ib.*

5. An auctioneer is an agent lawfully authorized by the purchaser of lands or goods at auction, to sign the contract of sale for him, as the highest bidder. *ib.*
6. And writing his name, as the highest bidder, in the memorandum of sale, by the auctioneer, immediately on receiving his bid, and knocking down the hammer, is a sufficient signing within the statute of frauds, to bind the purchaser. *ib.*

*Vide* FRAUDULENT CONVEYANCE.

ULSTER AND ORANGE BRANCH  
TURNPIKE COMPANY.

According to the true construction of the Act to amend the act, entitled an act to incorporate the *Ulster and Orange Branch Turnpike Company*, (sess. 40. ch. 213. s. 2.) the owners of lands assessed under the act, are entitled to make the road through their own lands, under the inspection of the company, by the first of August, next after the assessment is made and completed. *Couch v. Ulster and Orange Branch Turnpike Company*, 26

*Vide* INJUNCTION, IV, V.

UTICA INSURANCE COMPANY.

Admitting that the *Utica Insurance Company* have no banking powers, and that notes and securities for the payment of money to them, as a banking association, are void by the act; (sess. 36. ch. 71.) yet a bond and judgment confessed thereon, by the makers of a note discounted by the Company, for the indemnity and security of the endorser, without any fraudulent intent to

evade the law, are valid. *Par-*  
*ker v. Rochester,* 329

## W.

### WASTE.

*Vide* INJUNCTION, II.

### WILL.

1. Subsequent marriage and birth of a child are an implied revocation of a will either of real or personal estate. *Brush v. Wilkins,* 506
2. But such presumptive revocation may be rebutted by circumstances. *ib.*
3. *It seems,* that a subsequent marriage or subsequent birth of a child alone, will not amount to an implied revocation. *ib.*
4. Implied revocations of wills are not within the statute of frauds. *ib.*

5. A will duly executed, but revoked by a subsequent marriage and birth of a child, cannot be connected with a will subsequently made, but not executed with the requisite solemnities to pass real estate, so as to constitute a valid will; but the estate descends to the heir at law. *ib.*

6. Where the will of the testator is so ambiguously expressed, as to render it proper for the executor to take the direction of the court, the costs of the suit will be ordered to be paid out of the fund in controversy. *Rogers v. Ross,* 608

*Vide* DEVISE.

### WITNESS.

*Vide* MORTGAGE. PRACTICE, IX.

END OF VOLUME IV.

E. J. K.



## ERRATA.

- Page 4, line 7, for "most" read least.  
 13, line 30, *dele* "separate" before "cases."  
 41, line 30, for "assessment" read assignment.  
 72, in the marginal note, for "cumbrance" read incumbrance.  
 86, line 10, for "against" read adjoining.  
 88, line 18, after "sold" insert after her death.  
 99, line 4, for "jointly" read justly.  
 108, line 32, before "punish" insert to.  
 ——— 34, for "his" read this.  
 110, line 14, for "19" read 28.  
 111, line 31, for "county" read country.  
 113, line 26, for "this" read the.  
 115, line 3, for "one not" read not one.  
 121, line 22, for "was" read were.  
 126, line 26, after "and" insert the fact was.  
 131, line 36, for "security" read surety.  
 132, line 15, for "reasonable" read unreasonable.  
 133, line 11, after "apply to" insert the surety, before applying to.  
 138, 17th line of the head note, for "joint" read trust.  
 137, line 30, for "proportion" read proportions.  
 150, line 3, for "1817" read 1787.  
 170, line 17, for "levied" read taxed.  
 178, line 13, before "to be" insert were.  
 183, line 2, for "prohibit" read protect.  
 187, first line of head note, for "there" read *there*.  
 189, line 26, for "common" read canon.  
 192, line 11, for "quousque" read *quousque*.  
 193, line 26, for "231" read 331.  
 195, line 6, for "common" read canon.  
 ——— 7, for "other" read the.  
 206, lines 24 and 25, for "did not hear" read not hearing.  
 ——— line 26, *dele* "the plaintiff."  
 231, line 22, for "conceiving" read conceived.  
 234, line 3, for "were" read was.  
 281, in the sixth line of the head note, for "testator" read trustee.  
 282, line 30, after "made" insert by them.  
 310, in the eleventh line of the head note, after "held" insert not.  
 ——— line 2, for "Makens" read *Makens*.  
 312, line 9, for "were" read was.  
 347, 1, for "heedless" read unheeded.  
 350, line 19, for "1818" read 1819.  
 369, line 26, for "profit" read profits.  
 405, line 3, for "Gimmer's" read Zimmer's.  
 422, line 15, for "mouths" read mouth.  
 433, line 22, for "several" read severe.  
 438, line 17, for "Harris' Ch." read *Harrison's Ch. Pr.*  
 464, line 12, for "flatu" read *flatu*.  
 465, line 21, insert 5 before "Cranch."  
 466, line 4, insert 1 before "Don's."  
 487, in the marginal note, line 27, insert it, after "to."  
 511, line 2, for "rumpustur" read *rumpustur*.  
 541, line 28, insert but, after "sale."  
 547, in the 7th and 8th lines of the head note, *dele* the words, "and the clerk  
 must attend with the record of the bill, to be read at the hearing."  
 549, in the third line of the head note, for "residing" read dying.  
 656, line 12, for "first" read *fourth*.  
 657, last line but one, for "withal" read with us.  
 661, line 12, *dele* "the" before counsel.

*correctly amended*

303 340







*Not Indel 30 Aug  
1823*

NEW YORK CHANCERY COURT.

*Funds of the Court of Chancery.*—On the fifth instant, when Mr. Kip transferred to his successor in office the records and funds of this Court, there were found to be within the control of that officer,

|                     |              |
|---------------------|--------------|
| In stock the sum of | \$130,472 44 |
| Bonds and mortgages | 36,475 04    |
| Cash                | 23,150 42    |

190,097 90

|                                                      |            |
|------------------------------------------------------|------------|
| Of which may hereafter be called for only the sum of | 181,605 62 |
|------------------------------------------------------|------------|

Leaving a surplus fund belonging to the Court of 8,492 28

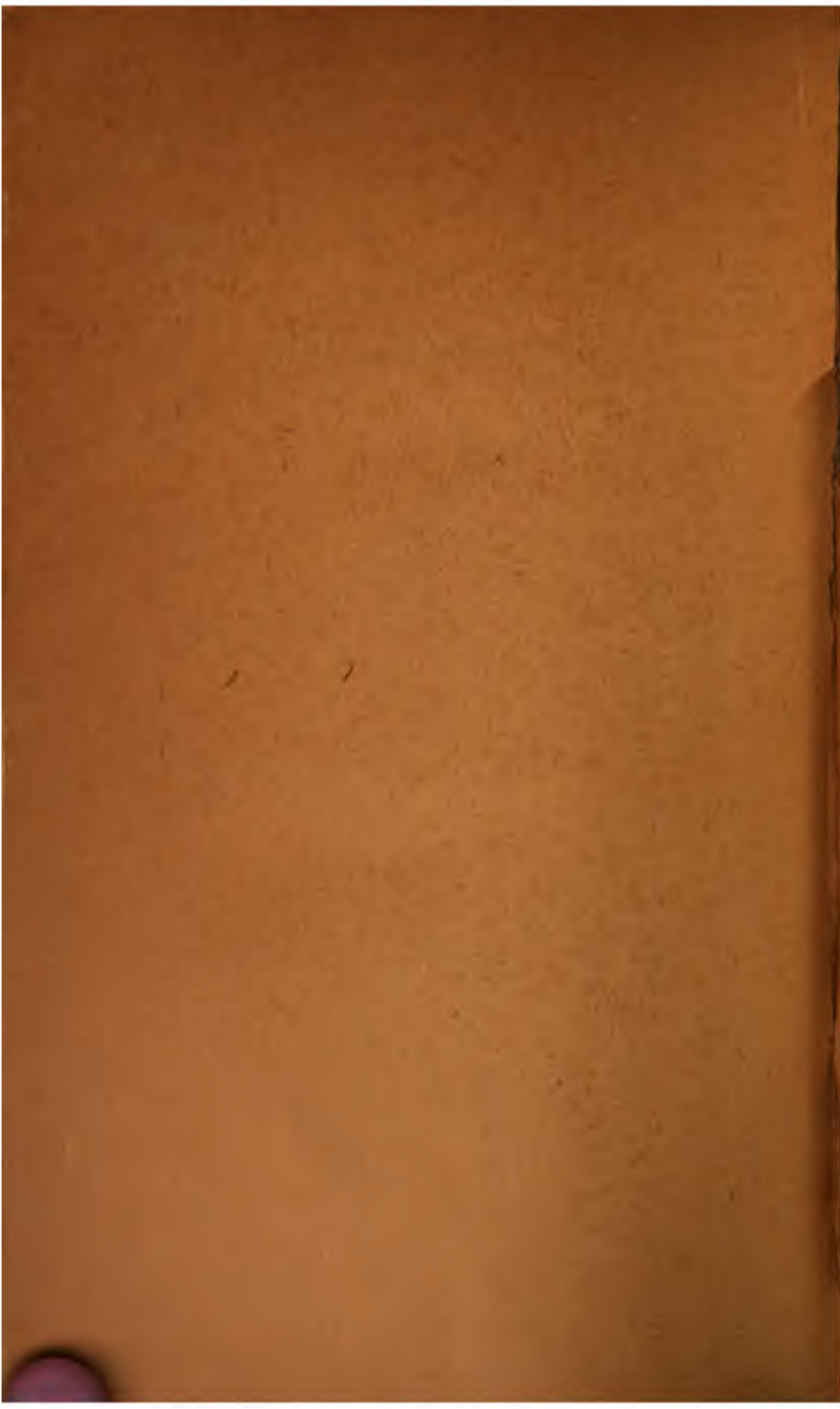
This sum, with \$1500 (heretofore paid out pursuant to the orders of the Court) making together a sum of \$10,000, has been accumulated by the judicious investments made by Mr. Kip of balances remaining from time to time in his hands.

When he entered upon the duties of the office in December, 1804, there was in court the sum of about \$1700 belonging exclusively to suitors not invested; then the accounts and records of the office were all irregularity and confusion. In August, 1823, when he resigned his place, nothing could exceed the precision and clearness of its arrangement.

In retiring from office it may be said of Mr. Kip, that he has done that which we believe was never before done by any officer of any court in the world. He has paid to a successful suitor, after deducting the expenses of an extended litigation, more money than was deposited in Court.

We invite the attention to this fact of Mr. Brougham, if peradventure our paper shall ever reach his eyes, in order that he may contrast it, in the next discussion in the House of Commons on the subject, with the proceedings of the English Court of Chancery in like circumstances. He may further state, what is also a fact, and one that will startle yet more the doubting practitioners in Chancery at Westminster Hall, that, under its present organization, a suit may be carried through our Court of Chancery in less time than a suit at common law.













HARVARD LAW

